

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

ZEXI LI

Plaintiff/Moving Party

- and -

**CHRIS BARBER, BENJAMIN DICHTER, TAMARA LICH, PATRICK KING and
JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5,
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JOHN DOE 56, JOHN DOE 57, JOHN DOE 58, JOHN DOE 59 and JOHN DOE 60**

Defendants/Responding Parties

Proceeding under the *Class Proceedings Act, 1992*

**SUPPLEMENTARY MOTION RECORD
Motion for Interlocutory Injunction**

CHAMP & ASSOCIATES
Barristers and Solicitors
4 [REDACTED]
Ottawa, ON [REDACTED]

Per: Paul Champ
LSO: 4 [REDACTED]

T: 613-237-[REDACTED]
[REDACTED]

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- 1 Affidavit of Sean Flynn, dated February 6, 2022

Exhibit A: City of Ottawa Press Release, dated February 6, 2022

Exhibit B: CTV News, “Ottawa mayor declares state of emergency amid ‘Freedom Convoy’ protest” dated February 6, 2022

DRAFT ORDER

- 2 Draft Order (revised)

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- 3 *R v Canadian Broadcasting Corp.*, [2018 SCC 5](#)

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- 4 *Emergency Management and Civil Protection Act*, RSO 1990, c E.9
- 5 *Highway Traffic Act*, RSO 1990, c H.8, s. 75(4)
- 6 City of Ottawa Noise By-Law, By-Law No. 2017-255
- 7 *469238 BC Ltd (Lawrence Heights) v Okanagan Aggregates Ltd (Motoplex Speedway and Event Park)*, [2016 BCSC 721](#)
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Defendants/Responding Parties

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF SEAN FLYNN

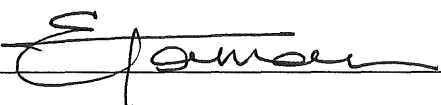
I, SEAN FLYNN, of the City of Ottawa, in the Province of Ontario, AFFIRM:

1. I am resident of Ottawa and concerned citizen. I have been regularly attending the site of the Trucker Convoy protest to bear witness to what is happening

there. As such, I have personal knowledge of the matters to which I hereinafter depose except where I have stated my evidence to be on information and belief, in which case I have indicated the source of my information and my belief in the truth of the information.

2. On February 6, 2022 I read and do verily believe a media report on the CTV news website, www.ottawa.ctvnews.ca, reporting that Ottawa Mayor Jim Watson had declared a state of emergency pursuant to the Emergency Management and Civil Protection Act. I visited the City of Ottawa's website at www.ottawa.ca where I reviewed a press release dated February 6, 2022 announcing the declaration of a state of emergency by the Mayor. Attached hereto as Exhibit "A" is a true copy of the press release dated February 6, 2022 from the City of Ottawa's website.
3. The CTV news article attributed the following statement to city solicitor, David White regarding the impact of declaring a state of emergency: "From the standpoint of a legal authority, the declaration of an emergency under the Emergency Management and Civil Protection Act does little." Mr. White is also reported to have stated in relation to the declaration of an emergency under the Act: "It may provide some relief from some of the strictures that we operate under from a procurement standpoint, but it does not imbue the mayor or the city with any additional legal authority." Attached hereto as Exhibit "B" is a true copy of the CTV news article dated February 6, 2022.
4. I make this affidavit in good faith and for no improper purpose.

AFFIRMED before me by in)
the Ottawa, ON this 6th day of)
February, 2022.)


A Commissioner etc.


Sean Flynn

This is Exhibit "A" attached to
and forming part of the
Affidavit of Sean Flynn, sworn
before me this 6th day of
February, 2022 at the City of
Ottawa, in the Province of
Ontario.


.....
A Commissioner etc.

Menu ▼

FR



Mayor Watson declares state of emergency for Ottawa due to ongoing demonstration

February 6, 2022

Announcements and Events

Mayor Jim Watson today declared a state of emergency for the City of Ottawa due to the ongoing demonstration.

Declaring a state of emergency reflects the serious danger and threat to the safety and security of residents posed by the ongoing demonstrations and highlights the need for support from other jurisdictions and levels of government. It also provides greater flexibility within the municipal administration to enable the City of Ottawa to manage business continuity for essential services for its residents and enables a more flexible procurement process, which could help purchase equipment required by frontline workers and first responders.

Residents can continue to visit ottawa.ca or follow us [Facebook](#) and [Twitter](#) for the latest information updates and developments.

For more information on City programs and services, visit ottawa.ca, call 3-1-1 (TTY: 613-580-2401) or 613-580-2400 to contact the City using Canada Video Relay Service. You can also connect with us through [Facebook](#), [Twitter](#) and [Instagram](#).

Public Inquiries

311@ottawa.ca

311

<https://ottawa.ca>

Media Inquiries

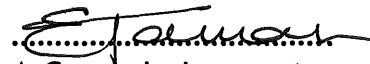
medias@ottawa.ca

613-580-2450

<https://ottawa.ca>

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This is Exhibit "B" attached to
and forming part of the
Affidavit of Sean Flynn, sworn
before me this 6th day of
February, 2022 at the City of
Ottawa, in the Province of
Ontario.


A Commissioner etc.

[< Home](#)



OTTAWA | News

Ottawa mayor declares state of emergency amid 'Freedom Convoy' protest



Josh Pringle

CTV News Ottawa Digital Multi-Skilled Journalist

[@PringleJosh](#) | [Contact](#)



Ted Raymond

CTV News Ottawa Digital Multi-Skilled Journalist

[Contact](#)

Published Sunday, February 6, 2022 4:00AM EST

Last Updated Sunday, February 6, 2022 4:55PM EST

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Mayor Jim Watson has declared a state of emergency for the city of Ottawa as the "Freedom Convoy" demonstration against COVID-19 rules continues to occupy the downtown core.

The mayor declared the state of emergency just hours after Ottawa police said new enforcement is underway to cut off the supply of fuel and materials to protesters on Wellington Street and streets near Parliament Hill.

"Declaring a state of emergency reflects the serious danger and threat to the safety and security of residents posed by the ongoing demonstrations and highlights the need for support from other jurisdictions and levels of government," said a statement from the city.

Related Stories

- **'We need an additional surge of resources:' Ottawa police chief**
- **Hearing into lawsuit to stop convoy horns in Ottawa adjourned to Monday**
- **Counter-protest calls for an end to the 'Freedom Convoy' demonstration in downtown Ottawa**
- **Road closures and service impacts in downtown Ottawa due to the 'Freedom Convoy' protest**

"It also provides greater flexibility within the municipal administration to enable the City of Ottawa to manage business continuity for essential services for its residents and enables a more flexible procurement process, which could help purchase equipment required by frontline workers and first responders."

Ottawa Police Services Board chair Diane Deans asked the city solicitor during Saturday's special Ottawa Police Services Board meeting if declaring a state of emergency would have "any immediate, positive impacts" on the situation in Ottawa.

"From the standpoint of a legal authority, the declaration of an emergency under the Emergency Management and Civil Protection Act does little," said Solicitor David White, adding there would be no additional authority to the city or police.

"It may provide some relief from some of the strictures that we operate under from a procurement standpoint, but it does not imbue the mayor or the city with any additional legal authority."

On Sunday morning, an estimated 500 trucks and vehicles remained in the so-called 'red zone' in downtown Ottawa, with hundreds of people remaining in the area to protest COVID-19 vaccine mandates.

Senior police officials told CTV News Ottawa more enforcement is coming to the downtown core. In a tweet, police said, "Anyone attempting to bring material supports to the demonstrators could be subject to arrest."

Speaking on Newstalk 580 CFRA's *CFRA Live with Andrew Pinsent* Sunday morning, Watson said the downtown area is "out of control", with protesters taking over the downtown core.

"The situation at this point is completely out of control because the individuals with the protest are calling the shots," Watson said. "They have far more people than we have police officers and I've indicated to the chief that we have to be much more nimble and proactive when it comes to these activities."

Watson mentioned the wooden structure protesters built at Confederation Park, which has become a "community kitchen." He said more should have been done to stop that sooner.

"Now, it's become a rallying point, where there's so many people there. How do we go in and enforce the laws and the NCC's property rights?"

Residents reported hearing fireworks, loud music and truck horns late Saturday night and early Sunday morning through the downtown core.

"Overnight, demonstrators exhibited extremely disruptive and unlawful behaviour, which presented risks to public safety and unacceptable distress for Ottawa residents," said police in a statement Sunday afternoon.

Police and Bylaw Services officers issued more than 450 tickets since Saturday morning, including for excessive noise and fireworks.

On Saturday, Ottawa's police chief admitted the force doesn't have enough resources to address the situation.

"We do not have sufficient resources to adequately and effectively address this situation while adequately and effectively providing policing in this city," said Chief Peter Sloly during a special Ottawa Police Services Board meeting.

On Saturday, an estimated 5,000 people and 1,000 tractor trailers and personal vehicles filled downtown Ottawa to join the protest. Hundreds of people attended a counter-protest at Ottawa City Hall, calling for an end to the demonstration.

"This is a siege. It is something that is different in our democracy than something I've ever experienced in my life," said Sloly.

"It's not a demonstration, it's not an occupation, it's something and we don't have a Police Act that can adequately or effectively address this circumstance."

Organizers of the demonstration said they would hold a press conference this afternoon, but they later told CTV News it was not invited.

In a statement, organizers said they would not be honking their truck horns Sunday morning.

"Out of respect for the Lord's Day, for members of our military who have sacrificed and who continue to sacrifice so much for our freedom, for the men and women in blue who are doing such a superb job protecting us, and as a gesture of goodwill, members of our Convoy will desist from the blowing of Horns tomorrow, Sunday from 9 a.m. to 1 p.m. Ottawa time," a news release said.

However, horns could still be heard downtown.



580 CFRA

CFRA Live – The individuals of the protests are

00:00 / 13:42

Centretown Community Association

The Centretown Community Association says there has been an "appalling failure to protect and support" residents, businesses, churches and other organizations by Ottawa Police and the city of Ottawa during the "Freedom Convoy" demonstration.

Association President Mary Huang released an open letter to Mayor Jim Watson and Chief Peter Sloly on day 10 of the demonstrations.

"This is not a peaceful protest," said Huang. "It is an illegal occupation. These occupiers have used their vehicles to blockade downtown streets since arriving last week. They have displayed obvious symbols of hate, including Swastikas and Confederate Flags. They have defecated on a local residence bearing an LGBTQ pride flag."

The letter says that since the demonstration began, "the police and city have failed to enforce the law against occupiers, allowing them to engage in significant unlawful activity without penalty.

"Despite a reported \$800,000 per day for extra resources, there is still an ongoing failure of the police to fulfill its mission to 'protect the safety and security of communities.'"

The Centretown Community Association calls on police and the city to take immediate action, including:

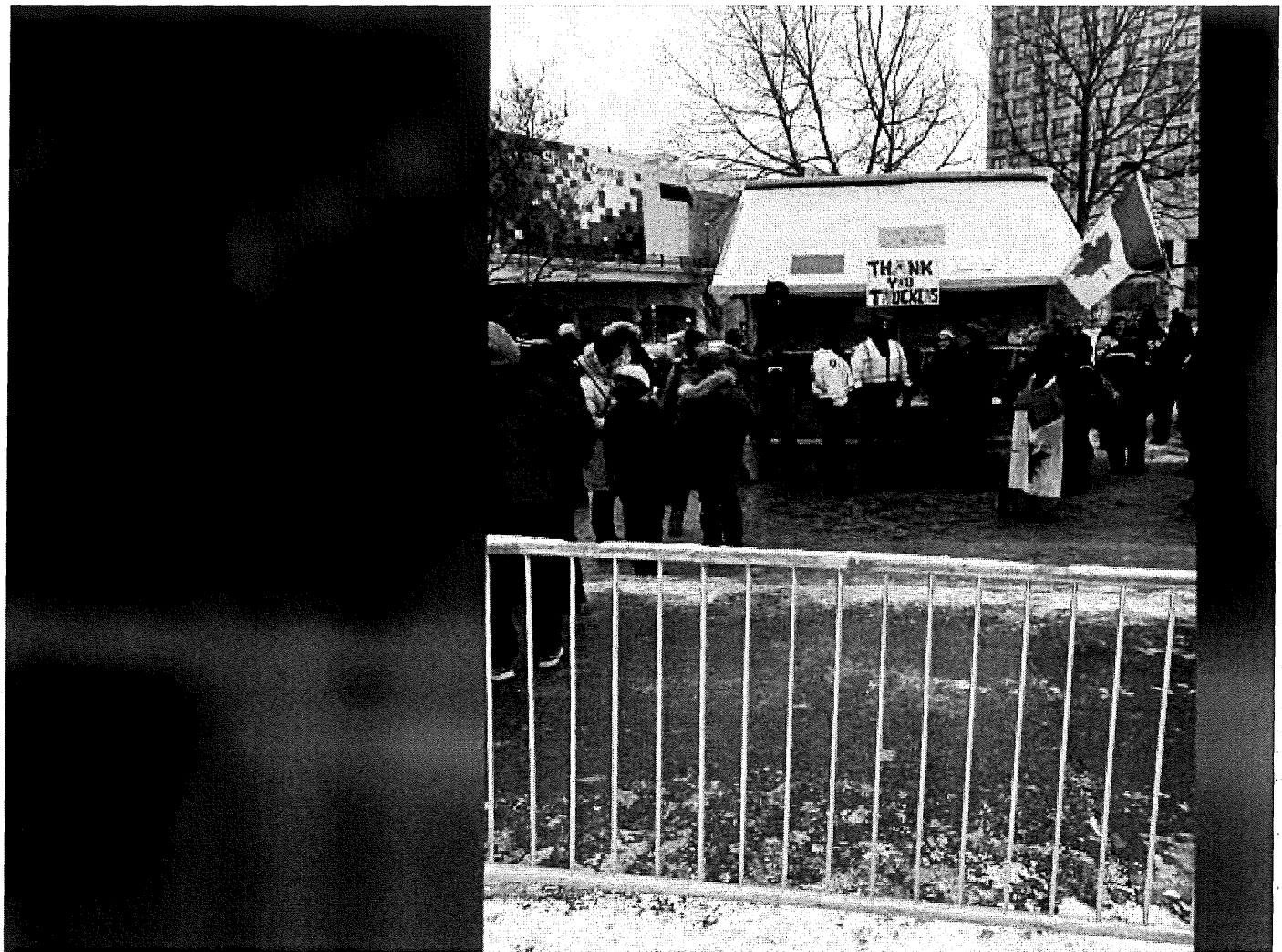
- Enforce all applicable bylaws on the "occupiers"
- Obtain court injunctions where required to clear residential areas and allow residents to safely access homes, workplaces, and amenities in the community
- Engage in efforts to contain the protests to a strictly limited area
- Impose deadlines and strict fines on "occupiers for not moving" to a designated zone
- Apologize to residents for "grossly mishandling the situation and failure in the mission to protect the safety and security of communities," said the letter.

Confederation Park

Protesters who built a wooden shed in a downtown Ottawa park moved it to the Ottawa Baseball Stadium five kilometres away, along with all the supplies.

People were packing up the "community kitchen" wooden shed and other supplies in Confederation Park Sunday morning under the watchful eye of Ottawa Police and NCC conservation officers.

The park located less than a kilometre from the "Freedom Convoy" demonstration on Parliament Hill had turned into a supply and staging area, with dozens of vehicles parked in the area and barbecues and supply tents set up. Last Thursday, demonstrators began building a wooden structure, saying it was a community kitchen for anyone to get food or drinks.



ENFORCEMENT

Ottawa police provided an update on the situation Sunday morning.

"Overnight, demonstrators exhibited extremely disruptive and unlawful behaviour, which presented risks to public safety and unacceptable distress for Ottawa residents," said police.

Police and Bylaw Services officers issued more than 450 tickets since Saturday morning, including for excessive noise and fireworks.

Ninety-seven criminal investigations have been launched since the start of the "Freedom Convoy" demonstration in downtown Ottawa.

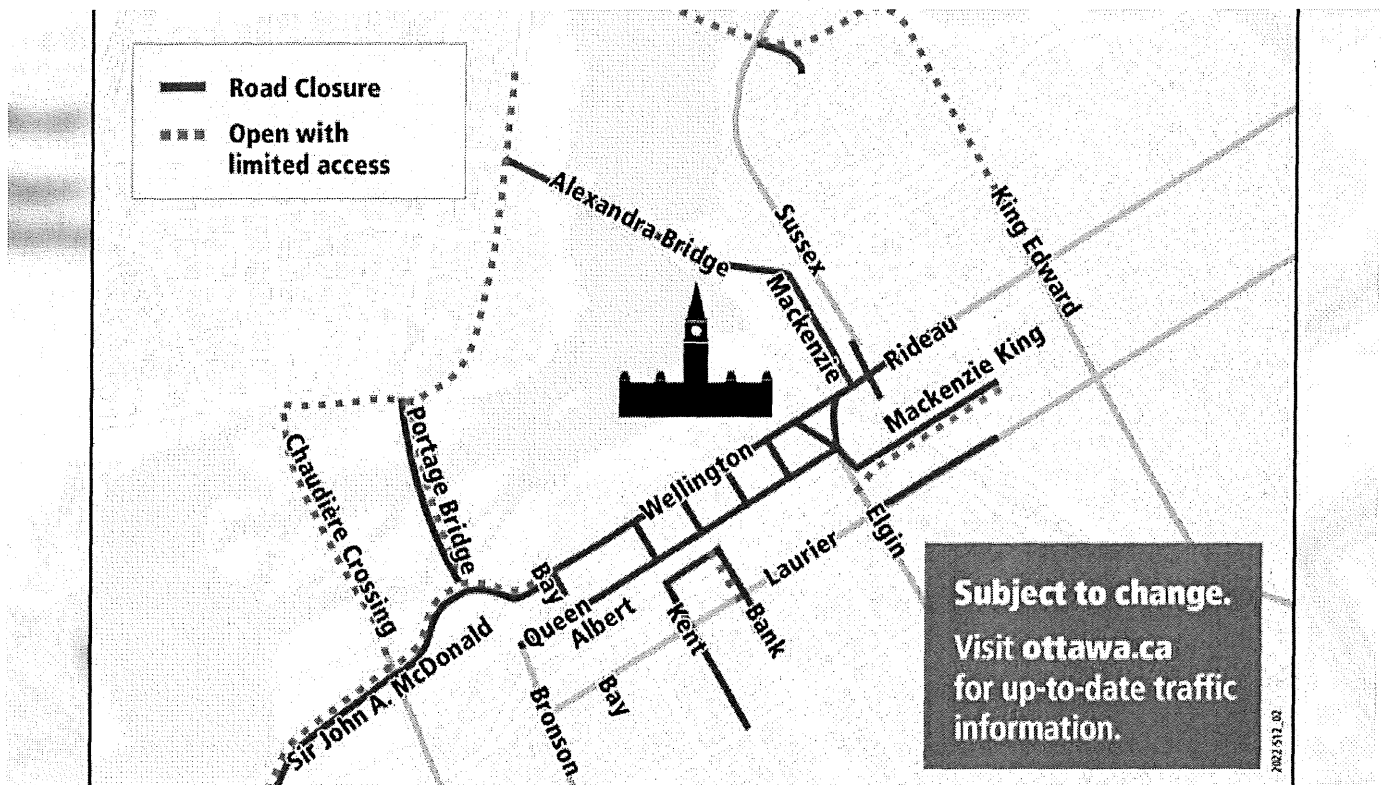
ROADS

Concrete barriers and heavy equipment barricades remain in place throughout Centretown, Lowertown, ByWard Market, Sandy Hill and the Glebe.

Several roads in the downtown core are closed from Rideau Street to Bay Street and Wellington Street to Albert Street.

Police warn the following off-ramps on Highway 417 may be temporarily closed:

- Nicholas / Mann (Westbound & Eastbound)
- Metcalfe (Westbound & Eastbound)
- Bronson (Westbound)
- Parkdale (Westbound & Eastbound)
- Island Park (Westbound)
- Kent (Eastbound)
- Vanier (Eastbound)
- St. Laurent (Eastbound)
- Pinecrest Road (Eastbound)
- Montreal Road (Eastbound & Westbound)
- Woodroffe Avenue (Eastbound & Westbound)
- Aviation Parkway (Westbound)
- Walkley Road (Westbound)



Mayor, councillor call on the federal government to step in

As the protest continues for a second weekend, Mayor Jim Watson is looking to the federal government for more help to end the protest.

"The federal government has an important role," said Watson during an interview on CTV News at Six. "They're going to have to sit down and have some kind of a discussion, some kind of

mediation to get this situation resolved because it's now spreading across the country."

Watson says he spoke with Premier Doug Ford on Friday and Public Safety Minister Marco Mendicino on Thursday to secure additional OPP and RCMP officers to assist Ottawa police.

The mayor also commented on the bouncy castles and saunas being set up in downtown Ottawa and at the Ottawa Baseball Stadium.

"It's disturbing when you see the protest turning into what looks like some kind of fun carnival, where they've got bouncy castles and hot tubs and saunas," said Watson. "A complete insult to the people who are putting up with this nonsense for the last seven days and it shows a great deal of insensitivity."

Councillor Catherine McKenney, who represents part of the area affected by the demonstration, called on the prime minister to intervene.

"Dear Justin Trudeau please do something. You have a responsibility to protect your Capital. We are under siege. Day 9," they tweeted, while quoting a video of fireworks going off amid densely packed buildings in the downtown core.

In addition to the horns, demonstrators have been lighting off fireworks at night, prompting concern from some residents about the proximity to residential high-rises, as well as the fuel cannisters strewn about the area.

Last week, McKenney wrote a letter to the prime minister, calling on the federal government and the RCMP to assume full operational control of Parliament Hill and the Parliamentary Precinct.

RCGT Park

CTV News Ottawa's Jeremie Charron reported Saturday that the Ottawa Baseball Stadium now looks like a command centre for the "Freedom Convoy" demonstration. Several large tents are set up in the parking lot on Coventry Road, and approximately 100 vehicles were parked there on Saturday.

"The initial plan was to keep those trucks there because they couldn't fit into the downtown," said Watson.

"What is an error is we should have had some control at the gate. They shouldn't be bringing in hot tubs, they shouldn't be bringing in bouncy castles – that's just ridiculous."

Saunas were set up at RCGT Park this week.

Coun. Rawlson King said during Saturday's special Ottawa Police Services Board meeting that the initial plan was to divert trucks away from the core, but it has now turned into a "staging area." King asked police what the plan was to deal with the park.

"We have been working with people at that site, and I say with people at that site they have been to a point cooperative, but we do recognize that has now become a staging area and a refuelling area for them," said Acting Deputy Chief Ferguson.

"So we are looking at addressing."

Ferguson said police are working with Ottawa Fire to see "what avenues are available to us to enforce the laws and to make sure that's rendered safe."

RELATED IMAGES



Hundreds of trucks remain parked on Wellington Street and surrounding streets in downtown Ottawa on day of the "Freedom Convoy" demonstration in downtown Ottawa. (Josh Pringle/CTV News Ottawa)

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DICHTER, TAMARA LICH, PATRICK KING and
JOHN DOES 1-60

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Defendants (Responding Parties)

ONTARIO
SUPERIOR COURT OF JUSTICE

AFFIDAVIT OF SEAN FLYNN

CHAMP & ASSOCIATES
Equity Chambers

[REDACTED]

Per: Paul Champ

LSUC#: [REDACTED]

Email: pchamp@[REDACTED]

Solicitors for the Plaintiff

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE) _____, THE ____ DAY
)
) OF _____, 2022

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Defendants/Responding Parties

DRAFT ORDER

THIS MOTION, made by the Plaintiff for an interlocutory injunction and costs, pursuant to section 101 of the *Courts of Justice Act* and Rule 40.01 of the *Rules of Civil Procedure*, was heard at Ottawa on February 5 and 7, 2022 by videoconference.

UPON READING the motion records of the parties and **UPON HEARING** the oral arguments made by counsel for the parties by Zoom,

1. **THIS COURT ORDERS** that an interlocutory injunction is granted, pursuant to section 101 of the *Courts of Justice Act*, Rule 40.01 of the *Rules of Civil*

Procedure, and section 12 of the *Class Proceedings Act*.

2. **THIS COURT ORDERS** that any persons having notice of this Order are hereby restrained and enjoined from using air horns or train horns, other than those on a motor vehicle of a municipal fire department, anywhere in the City of Ottawa, for 60 days from the date of this Order.
3. **THIS COURT ORDERS** that the Ottawa Police Service and any other police service having jurisdiction where this Order is valid shall do all things reasonably able to enforce this Order.
4. **THIS COURT ORDERS** that the Ottawa Police Service and any other police service having jurisdiction where this Order is valid is hereby authorized to arrest and remove any person who the police officer has reasonable and probable grounds to believe is contravening or knowingly has contravened the provisions of this Order.
5. **THIS COURT ORDERS** that the Ottawa Police Service and any member of any other police service having jurisdiction where this Order is valid may search any place and seize any item where he or she has reasonable and probable grounds for believing that items may be located or used to contravene this Order.
6. **THIS COURT ORDERS** that, provided the terms of this Order are complied with, the Defendants and other persons remain at liberty to engage in a peaceful, lawful and safe protest.
7. **NOTICE OF THIS ORDER** may be given by posting copies of this Order in or around downtown Ottawa, by reading the Order to any person, including but not limited to reading the Order over an amplification system, and/or by publishing this Order online, including on social media accounts associated with the Defendants.
8. **THIS ORDER** shall not apply to persons acting in the course of or in the exercise of a statutory duty, power or authority.
9. **THIS COURT ORDERS** that the Moving Party's costs of this motion be granted, on a substantial indemnity basis.
10. **THIS ORDER** will remain in force for 60 days.

R. v. Canadian Broadcasting Corp.

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Heard: November 1, 2017;

Judgment: February 9, 2018.

File No.: 37360.

[2018] 1 S.C.R. 196 | [2018] 1 R.C.S. 196 | [2018] S.C.J. No. 5 | [2018] A.C.S. no 5 | 2018 SCC 5

Canadian Broadcasting Corporation Appellant; v. Her Majesty The Queen Respondent, and CTV, a Division of Bell Media Inc., Global News a division of Corus Television Limited Partnership The Globe and Mail Inc., Postmedia Network Inc. Vice Studio Canada Inc., Aboriginal Peoples Television Network and AD IDEM/ Canadian Media Lawyers Association Interveners

(33 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Case Summary

Catchwords:

Injunctions — Interlocutory injunctions — Publication bans — Mandatory publication ban issued pursuant to Criminal Code respecting identity of young victim — Media outlet refused to remove from its website articles which pre-existed publication ban and which identified victim by name and photograph — Crown bringing application for contempt and for mandatory interlocutory injunction requiring removal of information from media outlet's website — Applicable framework for granting mandatory interlocutory injunction — Whether Crown must establish strong prima facie case or serious issue to be tried — Whether chambers judge erred in refusing interlocutory injunction because Crown failed to show strong prima facie case of criminal contempt — Criminal Code, R.S.C. 1985, c. C-46, s. 486.4(2.1), (2.2).

[page197]

Summary:

An accused was charged with the first degree murder of a person under the age of 18. Upon the Crown's request, a mandatory ban prohibiting the publication, broadcast or transmission in any way of any

information that could identify the victim was ordered pursuant to s. 486.4(2.2) of the *Criminal Code*. Prior to the issuance of the publication ban, CBC posted information revealing the identity of the victim on its website. As a result of CBC's refusal to remove this information, the Crown sought an order citing CBC in criminal contempt of the publication ban and an interlocutory injunction directing the removal of the victim's identifying information. The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. The majority of the Court of Appeal allowed the appeal and granted the mandatory interlocutory injunction.

Held: The appeal should be allowed.

To obtain a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR -- MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has demonstrated a strong *prima facie* case. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction further demand an extensive review of the merits at the interlocutory stage. This modified *RJR -- MacDonald* test entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice. The applicant must also demonstrate that irreparable harm will result if the relief is not granted and that the balance of convenience favours granting the injunction.

In this case, a literal reading of the originating notice shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding. The Crown thus proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt. The originating notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. The two applications are linked, such that the latter is tied not to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. Each prayer for relief does not launch an independent proceeding; rather, both relate to [page198] the alleged criminal contempt. In addition, an injunction is not a cause of action, in the sense of containing its own authorizing force. It is a remedy. An originating application must state both the claim and the basis for it and the remedy sought. Here, the Crown's originating notice discloses only a single basis for seeking a remedy: CBC's alleged criminal contempt of court. Therefore, the Crown was bound to show a strong *prima facie* case of criminal contempt of court. This case should not however be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters. The delineation of the circumstances in which an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct is not decided here.

The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. Appellate intervention is justified only where the chambers judge proceeded on a misunderstanding of the law or of the evidence before him, where an inference can be demonstrated to be wrong by further evidence that has since become available, where there has been a change of circumstances or where the decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge could have reached it. In this case, the Crown's burden was not to show a case for criminal contempt that leans one way or another, but rather a case, based on the law and evidence presented, that has a strong likelihood that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and the Crown has failed to do so here. The

chambers judge applied the correct legal test in deciding the Crown's application and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

Cases Cited

Applied: *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; **distinguished:** *Canada (Human Rights Commission) v. Canadian Liberty Net*, [page199] [1998] 1 S.C.R. 626; **referred to:** *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352; *Conway v. Zinkhofer*, 2006 ABCA 74; *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152; *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277; *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405; *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911; *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387; *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51; *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402; *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793; *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712; *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148; *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (QL); *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042; *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331, aff'd [1991] 1 S.C.R. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, leave to appeal refused, [2008] 3 S.C.R. viii.

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[page200]

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History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Slatter, McDonald and Greckol JJ.A.), 2016 ABCA 326, 404 D.L.R. (4th) 318, [2017] 3 W.W.R. 413, 43 Alta. L.R. (6th) 213, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085 (QL), 2016 CarswellAlta 2034 (WL Can.), setting aside a decision of Michalyshyn J., 2016 ABQB 204, [2016] 9 W.W.R. 613, 37 Alta. L.R. (6th) 299, 86 C.P.C. (7th) 373, [2016] A.J. No. 336 (QL), 2016 CarswellAlta 620 (WL Can.). Appeal allowed.

Counsel

Frederick S. Kozak, Q.C., Sean Ward, Tess Layton and Sean Moreman, for the appellant.

Iwona Kuklicz and Julie Snowden, for the respondent.

Iain A. C. MacKinnon, for the interveners.

The judgment of the Court was delivered by

BROWN J.

I. Introduction

1 The background leading to this appeal was summarized in the reasons of the chambers judge:¹

On March 5, 2016, [the accused] was charged with the first degree murder of D.H., a person under the age of 18 ("the victim"). On March 15, 2016 the Crown requested and a judge ordered a mandatory ban under s. 486.4(2.2) of the *Criminal Code*, R.S.C., 1985, c. C-46. The order prohibits the publication, broadcast or transmission in any way of information that could identify the victim.

[page201]

As of March 16, 2016, two articles which pre-existed the publication ban, and which identified the victim by name and photograph ("the articles"), continued to exist on the CBC Edmonton website.

In response to a March 16, 2016 Edmonton Police Service inquiry, a senior digital producer with CBC Edmonton advised that no future stories would contain the victim's identifying information.

On March 18, 2016, however, the pre-publication ban articles remained on the website, unaltered.

One of the articles contains some evidence that the victim's identity appears already in wide circulation, by way of social media, but also by reason of the fact the victim attended school and lived in a smaller Alberta community where the murder is alleged to have occurred.

2 Because CBC would not remove from its website the victim's identifying information published prior to the order granting a publication ban, the Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and an interlocutory injunction² directing removal of that information from CBC's website. As the terms of that Originating Notice are important to my proposed disposition of this appeal, I reproduce them here, in relevant part:³

TAKE NOTICE that an Application will be made by the Attorney General of Alberta on behalf of her Majesty the Queen before the presiding Justice of the Court of Queen's Bench, ... for an Order citing [CBC] in criminal contempt of court.

[page202]

AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case.

RELIEF SOUGHT:

1. That [CBC] be cited in criminal contempt of court.
2. That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case.
3. That an appropriate sentence be imposed against [CBC].
4. Any such further order that this Honourable Court deems appropriate.

3 The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. On appeal, the Court of Appeal divided on whether the Crown was entitled to a mandatory interlocutory injunction. While the majority allowed the appeal and granted the injunction, Greckol J.A., in dissent, would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application.⁴

4 For the reasons that follow, I would allow the appeal. In my respectful view, the chambers judge applied the correct legal test in deciding the Crown's application, and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

II. Legislative Provisions

5 Sections 486.4(2.1) and 486.4(2.2) of the *Criminal Code*,⁵ taken together, provide that a presiding judge or justice shall make an order, upon application by the victim or the prosecutor, for a publication ban in cases involving offences against victims under the age of 18 years. Specifically, the Crown or the victim [page203] is entitled to an order "directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way".

III. Judicial History

A. *The Chambers Judge's Reasons*

6 Acceding to the parties' submissions, the chambers judge applied a modified version of the tripartite test for an interlocutory injunction stated in *RJR - MacDonald Inc. v. Canada (Attorney General)*.⁶ This required the Crown to prove (1) a strong *prima facie* case for finding CBC in criminal contempt; (2) that the Crown would suffer irreparable harm were the injunction refused; and (3) that the balance of convenience favoured granting the injunction.

7 As to the requirement of a strong *prima facie* case, the Crown had argued for a "broad interpretation" of s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]", such that it would catch web-based articles posted *prior* to the publication ban.⁷ The chambers judge, however, concluded that the case authorities did not support such an interpretation. In these circumstances, and applying the test for criminal contempt stated in *United Nurses of Alberta v. Alberta (Attorney General)*,⁸ he found that the Crown could not "likely succeed" in proving beyond a reasonable doubt that CBC, by leaving the victim's identifying information on its website after the publication ban had been issued, was in "open and public defiance" of that order.⁹

8 Regarding the requirement of irreparable harm, the Crown had argued such harm would be suffered by the administration of justice, since the ongoing [page204] display of the victim's identifying information on CBC's website would deter others from seeking assistance or remedies. The chambers judge declined to so find, however, noting that the underlying policy objective of protecting a victim's anonymity loses significance where the victim is deceased. And, in assessing balance of convenience, the chambers judge determined that the compromising of CBC's freedom of expression, and of the public's interest in that expression, outweighed any harm to the administration of justice that would result from leaving the two impugned articles on CBC's website.

B. The Court of Appeal

9 At the Court of Appeal, the majority (Slatter and McDonald JJ.A.) reversed the chambers judge's decision and granted the mandatory interlocutory injunction sought by the Crown. The chambers judge, it held, had erred by characterizing this matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. Rather, the Originating Notice, "[w]hile essentially civil in nature, ... has a 'hybrid' aspect to it",¹⁰ in that it seeks both a citation for criminal contempt *and* the removal of the victim's identifying information from CBC's website. The request for the interlocutory injunction, the majority explained, is "tied back" to the latter request for an order removing the identifying information, and not to the request for a criminal contempt citation.¹¹ The issue, therefore, was "whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website".¹²

10 As to whether or not s. 486.4(2.1)'s reference to identifying information that is "published" is (as the Crown contends) met by the ongoing appearance [page205] of such information on a website after it is first posted, the majority conceded that "either position is arguable".¹³ That said, the majority viewed the Crown as having a strong *prima facie* case for a mandatory interlocutory injunction, since, if "published" is construed as a continuous activity, CBC is arguably wilfully disobeying the publication ban. Further, such disobedience is harmful to the integrity of the administration of justice, and contrary to Parliament's direction that such orders are to be mandatory.¹⁴ Finally, the balance of convenience did not favour CBC, since the publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not, in any case, be a defence against the contempt charge.

11 Justice Greckol would have dismissed the appeal. In her view, the majority's characterization of the relief sought in the Originating Notice as "hybrid" was misplaced, since the Crown's application for an interlocutory injunction was brought in respect of the sought-after citation for criminal contempt. The chambers judge asked the right question (being, whether the Crown could show a strong *prima facie* case of criminal contempt), and his exercise of discretion to refuse an injunction was entitled to deference. And here, where the proscriptions against "publish[ing]" and "transmitt[ing]" may reasonably bear two meanings, one capturing the impugned articles and one not, no strong *prima facie* case of criminal contempt could be shown. Further, and even allowing that open defiance of a facially valid court order may amount to irreparable harm to the administration of justice, the ambit of s. 486.4's proscriptions is an unsettled question. And, as the victim in this case is deceased, the privacy of the victim is not vulnerable to harm. Finally, and even if the pertinent provisions of the *Criminal Code* are presumed constitutional, the chambers judge was entitled [page206] to consider freedom of expression in assessing the balance of convenience.

IV. Analysis

A. *What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?*

12 In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*¹⁵ and then again in *RJR - MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*¹⁶ At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious.¹⁷ The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused.¹⁸ Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.¹⁹

13 This general framework is, however, just that - general. (Indeed, in *RJR - MacDonald*, the Court identified two exceptions which may call for "an extensive review of the merits" at the first stage of the analysis.²⁰) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR - MacDonald* test is into whether the applicants have shown a strong [page207] *prima facie* case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in *Google Inc. v. Equustek Solutions Inc.*²¹ In *Google*, however, the appellant did not argue that the first stage of the *RJR - MacDonald* test should be modified. Rather, the appellant agreed that only a "serious issue to be tried" needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.²² By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

14 Canadian courts have, since *RJR - MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.²³ Conversely, other courts have applied the less searching "serious issue to be tried" threshold.²⁴

15 In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR - MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* [page208] case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.²⁵ Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial".²⁶ The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR - MacDonald* as "extensive review of the merits" at the interlocutory stage.²⁷

16 A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions.²⁸ While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR - MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions".²⁹ For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that [page209] information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be".³⁰ In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.

17 This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success";³¹ a "strong and clear" or "unusually strong and clear" case;³² that he or she is "clearly right" or "clearly in the right";³³ that he or she enjoys a "high probability" or "great likelihood of success";³⁴ a "high degree of assurance" of success;³⁵ a "significant prospect" of success;³⁶ or "almost certain" success.³⁷ Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge [page210] must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

18 In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR - MacDonald* test, which proceeds as follows:

- (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the

applicant will be ultimately successful in proving the allegations set out in the originating notice;

(2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and

(3) The applicant must show that the balance of convenience favours granting the injunction.

B. Does the Liberty Net "Rarest and Clearest of Cases" Test Apply in These Circumstances?

19 CBC argues that, on an application for an interlocutory injunction where a media organization's right to free expression is at stake, the application judge should apply the test stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*.³⁸ This would entail the applicant showing "the rarest and clearest of cases",³⁹ such that the conduct complained of would be impossible to defend.

[page211]

20 In *Liberty Net*, the Court explained that the *RJR - MacDonald* tripartite test is not appropriately applied to cases of "pure" speech, comprising the expression of "the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself".⁴⁰ This appeal does not present such a case. The reason the Court gave in *Liberty Net* for not applying the *RJR - MacDonald* test to "pure" speech was that the defendant in such cases "has no tangible or measurable interest [also described as a 'tangible, immediate utility'] other than the expression itself".⁴¹ Where discriminatory hate speech or other potentially low-value speech is at issue (as was the case in *Liberty Net*), the *RJR - MacDonald* test would "stac[k] the cards" against the defendant at the second and third stages.⁴² In this appeal, however, the chambers judge correctly identified a "tangible, immediate utility" to CBC's posting of the identifying information, being the "public's interest" in CBC's right to express that information, and in freedom of the press.⁴³ Because CBC does not therefore face the same disadvantage as defendants face at the second and third stages of the *RJR - MacDonald* test in cases of low- to no-value speech, it is unnecessary to apply the "clearest of cases" threshold, and I would not do so.

C. What Strong Prima Facie Case Must the Crown Show?

21 As I have already canvassed, in this case, the majority at the Court of Appeal, in reversing the chambers judge, reasoned that he had mischaracterized the basis for which the Crown had sought the injunction. Specifically, the majority said that the [page212] Originating Notice, properly read, was "hybrid",⁴⁴ such that the application for the injunction did not "relate directly"⁴⁵ to the criminal contempt citation, but to the direction sought that CBC remove the victim's identifying information from its website. The identical wording shared by part of the Originating Notice's preamble ("AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case") and the part of the Originating Notice which sought an injunction ("That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case") was said to demonstrate "that the request for an interim injunction is tied back ... to ... the removal of the objectionable postings".⁴⁶ The "strong *prima facie* case" which the Crown was bound to show, then, was *not* one of criminal contempt, but rather of an "entitl[ement] ... to a mandatory order directing removal of the identifying material from the website".⁴⁷

22 In dissent, Greckol J.A. saw the matter differently. "A literal reading of the Originating Notice", she said, "shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding".⁴⁸ This was in her view confirmed by the record which reveals that the Crown had proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt.

23 For two reasons, I agree with Greckol J.A. First, the Originating Notice itself, and the sequencing therein of the relief sought, belies its putatively [page213] hybrid character. It begins by giving notice ("TAKE NOTICE") of an "an [a]pplication ... for an Order citing [CBC] in criminal contempt of court". That notice is immediately followed by a *further* notice ("AND FURTHER TAKE NOTICE") of an "application ... for an interim injunction, directing that [CBC] remove any information from [its] website that could identify the complainant in the [subject] case".⁴⁹ The text "AND FURTHER TAKE NOTICE" makes plain that the two applications are linked, such that the latter is tied *not* to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. In other words, each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt.

24 The second reason goes to the fundamental nature of an injunction and its relation to a cause of action. Rule 3.8(1) of the *Alberta Rules of Court*⁵⁰ requires that an originating application state *both* "the claim and the basis for it", *and* "the remedy sought". In other words, an applicant must record both "a basis" *and* "[a] remedy". An injunction is generally "a remedy ancillary to a cause of action".⁵¹ And here, the Crown's Originating Notice discloses only a single basis for seeking that remedy: CBC's alleged criminal contempt of court. As I have already noted, this is consistent with how the Crown framed its case at the courts below.

25 The majority's conclusion at the Court of Appeal that the basis for the injunction is an "entitl[ement] ... to a mandatory order directing removal [page214] of the identifying material from the website",⁵² therefore, simply begs the question: what, precisely, is the source in law of that entitlement? An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy. This is undoubtedly why, before both the chambers judge and the Court of Appeal, the Crown framed the matter as an application for an interlocutory injunction in the proceedings for a criminal contempt citation.⁵³ And, on that point, I respectfully endorse Greckol J.A.'s conclusion that it was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown was bound to show a strong *prima facie* case of criminal contempt of court.

26 I add this. It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that - even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt - an injunction would have been available.

D. *Is the Crown Entitled to a Mandatory Interlocutory Injunction?*

27 The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. In [page215] *Metropolitan Stores*,⁵⁴ the Court endorsed this statement of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*⁵⁵ about the circumstances in which that exercise of discretion may be set aside. Appellate intervention is justified only where the chambers judge proceeded "on a misunderstanding of the law or of the evidence before him", where an inference "can be demonstrated to be wrong by further evidence that has [since] become available", where there has been a change of circumstances, or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge ... could have reached it".⁵⁶ This principle was recently affirmed in *Google*.⁵⁷

28 In this case, and as I have explained, the first stage of the modified *RJR - MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.

29 In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:

To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). [page216] The Crown must prove these elements beyond a reasonable doubt.⁵⁸

30 As to the *actus reus* - that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC "defied or disobeyed [the publication ban] in a public way"⁵⁹ by leaving the victim's identifying information on its website - the chambers judge rejected the Crown's submission that s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ed]" should be "broad[ly]" interpreted.⁶⁰ In his view, the meaning of that text was not so obvious that the Crown could "likely succeed at trial" in showing that s. 486.4(2.1) would capture the impugned articles on CBC's website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

31 Significantly, the majority at the Court of Appeal conceded that "either position is arguable".⁶¹ In my respectful view, that was, in substance, an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt. Before us, the Crown urged this Court to infer that the majority nevertheless "leaned" towards the Crown's preferred interpretation of "publish[ed]" when it stated that to see the matter otherwise would "significantly limit the scope of many legal rights and obligations that depend on making information available to third parties [and] [i]f publishing is a continuous activity, then it is also arguable that [CBC] is wilfully disobeying the court order".⁶² But, even allowing that this may be so, the Crown's burden was not to show a case for criminal contempt that "leans" one way or another, but rather a case, based on the law [page217] and evidence presented, that has a *strong likelihood* of success at trial. And, again with respect, I see nothing in the chambers judge's reasons or, for that matter, in the majority reasons which persuades me that the chambers judge, in refusing the interlocutory

injunction sought here, committed any of the errors described in *Hadmor* as justifying appellate intervention.

32 My finding on this point is determinative, and obviates the need to consider *mens rea*, or the other two stages of the *RJR - MacDonald* test.

V. Conclusion

33 I would allow this appeal.

Appeal allowed.

Solicitors:

Solicitors for the appellant: Reynolds, Mirth, Richards & Farmer, Edmonton; Canadian Broadcasting Corporation, Toronto.

Solicitor for the respondent: Justice and Solicitor General, Appeals, Education & Prosecution Policy Branch, Calgary.

Solicitors for the interveners: Linden & Associates, Toronto.

1 2016 ABQB 204, [2016] 9 W.W.R. 613, at paras. 2-6 (emphasis added).

2 The Crown's Originating Notice uses the term "interim injunction". In substance, however, the Crown's application was for an interlocutory injunction. (See R. J. Sharpe, *Injunctions and Specific Performance* (4th ed. 2012), at paras. 2.15 and 2.55.)

3 A.R., at pp. 39-40.

4 2016 ABCA 326, 404 D.L.R. (4th) 318.

5 R.S.C. 1985, c. C-46.

6 [1994] 1 S.C.R. 311.

7 Chambers judge's reasons, at para. 26.

8 [1992] 1 S.C.R. 901, at p. 933.

9 Chambers judge's reasons, at para. 34.

10 para. 5.

11 para. 6.

12 para. 7.

13 para. 10.

14 para. 11.

15 [1987] 1 S.C.R. 110.

16 [1975] A.C. 396.

17 *RJR - MacDonald*, at pp. 334-35.

R. v. Canadian Broadcasting Corp.

- 18 *RJR - MacDonald*, at pp. 334 and 348.
- 19 *RJR - MacDonald*, at p. 334.
- 20 pp. 338-39.
- 21 2017 SCC 34, [2017] 1 S.C.R. 824.
- 22 *Google*, at paras. 25-27.
- 23 *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I (4th) 161, at para. 4; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352, at para. 40; *Conway v. Zinkhofer*, 2006 ABCA 74, at paras. 28-29 (CanLII); *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1, at para. 10; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, at para. 20, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152, at para. 54.
- 24 *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274, at para. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414, at paras. 1 and 22-25; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407, at para. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293, at paras. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277, at para. 65.
- 25 *Injunctions and Specific Performance*, at paras. 1.510, 1.530 and 2.640.
- 26 *Injunctions and Specific Performance*, at para. 2.640.
- 27 *RJR - MacDonald*, at pp. 338-39.
- 28 *Injunctions and Specific Performance*, at paras. 1.530 and 1.540. See also *Potash*, at paras. 43-44.
- 29 *Potash*, at para. 44; see also *Injunctions and Specific Performance*, at para. 1.540.
- 30 *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405, at para. 20.
- 31 *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911 (Ont. S.C.J.), at para. 24.
- 32 *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387, at para. 14 (CanLII); *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Ct. (Gen. Div.)), at paras. 49 and 52 (citing *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Ch. D.), at p. 409).
- 33 *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862 (Ont. S.C.J.), at para. 9; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793, at para. 12 (CanLII).
- 34 *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712 (Ont. S.C.J.), at para. 16.
- 35 *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148 (Ont. S.C.J.), at para. 16.
- 36 *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720, at para. 11 (QL).
- 37 *Barton-Reid*, at paras. 9, 12 and 17. (See, generally, M.-A. Vermette, "A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions" in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation*, 2011 (2011), 367, at pp. 378-79.)
- 38 [1998] 1 S.C.R. 626.
- 39 *Liberty Net*, at para. 49 (emphasis deleted).
- 40 paras. 47 and 49.
- 41 para. 47 (emphasis in original).
- 42 para. 47.
- 43 Chambers judge's reasons, at para. 59.
- 44 para. 5.

R. v. Canadian Broadcasting Corp.

- 45 para. 6.
- 46 C.A. reasons, at para. 6.
- 47 C.A. reasons, at para. 7.
- 48 C.A. reasons, at para. 23 (emphasis added).
- 49 A.R., at p. 39.
- 50 Alta. Reg. 124/2010.
- 51 *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at p. 930 (emphasis added).
- 52 C.A. reasons, at para. 7.
- 53 C.A. reasons, at paras. 25-26; chambers judge's reasons, at para. 7.
- 54 pp. 154-55.
- 55 [1982] 1 All E.R. 1042, at p. 1046 (H.L.).
- 56 See also *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331 (B.C.C.A.), aff'd [1991] 1 S.C.R. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, at para. 37, leave to appeal refused, [2008] 3 S.C.R. viii.
- 57 para. 22.
- 58 p. 933 (emphasis added).
- 59 Chambers judge's reasons, at para. 12.
- 60 para. 33.
- 61 C.A. reasons, at para. 10.
- 62 C.A. reasons, at para. 10; transcript, at pp. 65 and 70-71.

Emergency Management and Civil Protection Act

R.S.O. 1990, Chapter E.9

Consolidation Period: From July 1, 2019 to the e-Laws currency date.

Last amendment: 2019, c. 7, Sched. 17, s. 64.

Definitions

1 In this Act,

“emergency” means a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise; (“situation d’urgence”)

“emergency area” means the area in which an emergency exists; (“zone de crise”)

“emergency management program” means a program developed under section 2.1 or 5.1; (“programme de gestion des situations d’urgence”)

“emergency plan” means a plan formulated under section 3, 6, 8 or 8.1; (“plan de mesures d’urgence”)

“employee of a municipality” means an employee as defined in section 278 of the Municipal Act, 2001 or a designated employee as defined in section 217 of the City of Toronto Act, 2006, as the case may be; (“employé municipal”)

“head of council” includes a chair of the board of an improvement district; (“président du conseil”)

“local board” means a local board as defined in the Municipal Affairs Act; (“conseil local”)

“local services board” means a Local Services Board established under the Local Services Boards Act; (“régie locale des services publics”)

“member of council” includes a trustee of the board of an improvement district; (“membre du conseil”)

“public servant” means a public servant within the meaning of the Public Service of Ontario Act, 2006. (“fonctionnaire”) R.S.O. 1990, c. E.9, s. 1; 1999, c. 12, Sched. P, s. 3; 2002, c. 14, s. 3; 2002, c. 17, Sched. C, s. 10 (1, 2); 2006, c. 13, s. 1 (2); 2006, c. 32, Sched. C, s. 17; 2006, c. 35, Sched. C, s. 32 (1, 2).

Administration of Act

2 The Solicitor General is responsible for the administration of this Act. R.S.O. 1990, c. E.9, s. 2.

Cabinet advisory committee

2.0.1 The Lieutenant Governor in Council may appoint, from among the members of the Executive Council, a committee to advise the Lieutenant Governor in Council on matters relating to emergencies. 2006, c. 13, s. 1 (3).

Municipal emergency management programs

2.1 (1) Every municipality shall develop and implement an emergency management program and the council of the municipality shall by by-law adopt the emergency management program. 2002, c. 14, s. 4.

Same

(2) The emergency management program shall consist of,

(a) an emergency plan as required by section 3;

(b) training programs and exercises for employees of the municipality and other persons with respect to the provision of necessary services and the procedures to be followed in emergency response and recovery activities;

(c) public education on risks to public safety and on public preparedness for emergencies; and

(d) any other element required by the standards for emergency management programs set under section 14. 2002, c. 14, s. 4.

Hazard and risk assessment and infrastructure identification

(3) In developing its emergency management program, every municipality shall identify and assess the various hazards and risks to public safety that could give rise to emergencies and identify the facilities and other elements of the infrastructure that are at risk of being affected by emergencies. 2002, c. 14, s. 4.

Confidentiality for defence reasons

(4) Subject to subsection (5), a head of an institution, as defined in the Municipal Freedom of Information and Protection of Privacy Act, may refuse under that Act to disclose a record if,

(a) the record contains information required for the identification and assessment activities under subsection (3); and

(b) its disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism. 2002, c. 14, s. 4.

Same

(5) A head of an institution, as defined in the Municipal Freedom of Information and Protection of Privacy Act, shall not disclose a record described in subsection (4),

(a) if the institution is a municipality and the head of the institution is not the council of the municipality, without the prior approval of the council of the municipality;

(b) if the institution is a board, commission or body of a municipality, without the prior approval of the council of the municipality or, if it is a board, commission or body of two or more municipalities, without the prior approval of the councils of those municipalities. 2002, c. 14, s. 4.

Confidentiality of third party information

(6) A head of an institution, as defined in the Municipal Freedom of Information and Protection of Privacy Act, shall not, under that Act, disclose a record that,

(a) contains information required for the identification and assessment activities under subsection (3); and

(b) reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly. 2002, c. 14, s. 4.

Meetings closed to public

(7) The council of a municipality shall close to the public a meeting or part of a meeting if the subject matter being considered is the council's approval for the purpose of subsection (5). 2002, c. 14, s. 4.

Application of Municipal Freedom of Information and Protection of Privacy Act

(8) Nothing in this section affects a person's right of appeal under section 39 of the Municipal Freedom of Information and Protection of Privacy Act with respect to a record described in this section. 2002, c. 14, s. 4.

Municipal emergency plan

3 (1) Every municipality shall formulate an emergency plan governing the provision of necessary services during an emergency and the procedures under and the manner in which employees of the municipality and other persons will respond to the emergency

and the council of the municipality shall by by-law adopt the emergency plan. 2002, c. 14, s. 5 (1).

(2) Repealed: 2002, c. 14, s. 5 (1).

Co-ordination by county

(3) The council of a county may with the consent of the councils of the municipalities situated within the county co-ordinate and assist in the formulation of their emergency plans under subsection (1). R.S.O. 1990, c. E.9, s. 3 (3).

Specific emergencies may be designated

(4) The Lieutenant Governor in Council may designate a municipality to address a specific type of emergency in its emergency plan and, if so required, the municipality shall include the type of emergency specified in its emergency plan. 2002, c. 14, s. 5 (2).

Training and exercises

(5) Every municipality shall conduct training programs and exercises to ensure the readiness of employees of the municipality and other persons to act under the emergency plan. 2002, c. 14, s. 5 (3).

Review of plan

(6) Every municipality shall review and, if necessary, revise its emergency plan every year. 2002, c. 14, s. 5 (3).

Declaration of emergency

4 (1) The head of council of a municipality may declare that an emergency exists in the municipality or in any part thereof and may take such action and make such orders as he or she considers necessary and are not contrary to law to implement the emergency plan of the municipality and to protect property and the health, safety and welfare of the inhabitants of the emergency area. R.S.O. 1990, c. E.9, s. 4 (1).

Declaration as to termination of emergency

(2) The head of council or the council of a municipality may at any time declare that an emergency has terminated. R.S.O. 1990, c. E.9, s. 4 (2).

Solicitor General to be notified

(3) The head of council shall ensure that the Solicitor General is notified forthwith of a declaration made under subsection (1) or (2). R.S.O. 1990, c. E.9, s. 4 (3).

Premier may declare emergency terminated

(4) The Premier of Ontario may at any time declare that an emergency has terminated. R.S.O. 1990, c. E.9, s. 4 (4).

Conformity with upper-tier plan

5 The emergency plan of a lower-tier municipality in an upper-tier municipality, excluding a county, shall conform to the emergency plan of the upper-tier municipality and has no effect to the extent of any inconsistency and, for the purposes of this section, The Corporation of the County of Lambton shall be deemed to be an upper-tier municipality. 2002, c. 17, Sched. C, s. 10 (3).

Highway Traffic Act

R.S.O. 1990, CHAPTER H.8

Consolidation Period: From November 29, 2021 to the e-Laws currency date.

Last amendment: 2021, c. 26, Sched. 3, s. 67.

PART VI EQUIPMENT

Noise, smoke, bells and horns

Unnecessary noise

75 (4) A person having the control or charge of a motor vehicle shall not sound any bell, horn or other signalling device so as to make an unreasonable noise, and a driver of any motor vehicle shall not permit any unreasonable amount of smoke to escape from the motor vehicle, nor shall the driver at any time cause the motor vehicle to make any unnecessary noise, but this subsection does not apply to a motor vehicle of a municipal fire department while proceeding to a fire or answering a fire alarm call. R.S.O. 1990, c. H.8, s. 75 (4).



Noise By-law

By-law No. 2017-255

A By-law of the City of Ottawa respecting noises.

THIS DOCUMENT IS PROVIDED FOR OFFICE USE AND REFERENCE PURPOSES ONLY. EVERY EFFORT IS MADE TO ENSURE THE ACCURACY OF THIS DOCUMENT. IT IS NOT TO BE USED IN PLACE OF PHOTOCOPIES OF ORIGINAL BY-LAWS, NOR CAN IT BE USED FOR COURT PURPOSES. FOR LEGAL REQUIREMENTS, PLEASE REFER TO THE OFFICIAL BY-LAWS OF THE CITY OF OTTAWA.

Prepared by By-law & Regulatory Services

a motorized snow vehicle, or the cars of electric or steam railways running only upon rails.

UNUSUAL NOISE, NOISE LIKELY TO DISTURB

2. No person shall cause or permit any bass noise, unusual noise or noise likely to disturb the inhabitants of the City.

BELLS, HORNS, SHOUTING

3. No person shall cause or permit the ringing of any bell, sounding of any horn, or shouting in a manner likely to disturb the inhabitants of the City provided that nothing herein contained shall prevent,

- (a) the ringing of bells in connection with any church, chapel, meeting house or religious service
- (b) the ringing of bells in connection with City Hall between 0900 hours and 2100 hours of the same day;
- (c) the ringing of fire bells or fire alarms or the making of any other noise for the purpose of giving notice of fire or any other danger or any unlawful act, other than a car alarm, for a continuous period of time of twenty (20) minutes or less.
- (d) the sounding of a car alarm for a continuous period of time of five (5) minutes or less.

SOUND REPRODUCTION OR AMPLIFICATION DEVICES

4. (1) No person shall operate or use or cause to be operated or used any sound reproduction device between 2300 hours of one day and 0700 hours of the next day so as to disturb the peace and comfort of,
- (a) any person in any dwelling house, apartment house, hotel or other type of residence; or
 - (b) any owner or operator of a business in his or her place of business.
- (2) Despite subsection (1), no person shall operate or use or cause to be operated or used any sound reproduction device so as to disturb the peace and comfort of:

to haul, load or unload material in support of the tunnel construction for the Confederation Line Project.

- (b) No person shall operate or use, or permit to be operated or used, any transport trucks or vehicles as described in clause (a) if the noise from such operation or use has a level greater than 60 dBA when measured at the point of reception.
- (4)
 - (a) Despite subsection 8(1), power equipment for the Confederation Line Project shall be permitted to operate between 2100 hours of one day and 0700 hours of the next day to support tunnel excavation work performed three (3) metres and deeper below the immediate ground surface using tunneling, sequential excavation or other similar tunnel construction techniques.
 - (b) No person shall operate or use, or permit to be operated or used, any power equipment as described in clause (a) if the noise from such operation or use has a level greater than 60 dBA when measured at the point of reception.
- (5)
 - (a) Despite subsection 8(2), power equipment for the Confederation Line Project shall be permitted to operate before 0900 hours on any Saturday, Sunday or statutory or public holiday, to support tunnel excavation work performed three (3) metres and deeper below the immediate ground surface using tunneling, sequential excavation or other similar tunnel construction techniques.
 - (b) No person shall operate or use, or permit to be operated or used, any power equipment as described in clause (a) if the noise from such operation or use has a level greater than 60 dBA when measured at the point of reception.

UNNECESSARY MOTOR VEHICLE NOISE

15. No person shall cause or permit unnecessary motor vehicle noise such as the sounding of the horn, revving of engine and the squealing of tires of any motor vehicle on any property other than a highway.

IDLING MOTOR VEHICLES

16. (1) No person shall operate or permit the operation of an engine or motor in, or on, any motor vehicle or item of attached auxiliary equipment for a

continuous period exceeding five (5) minutes while such vehicle is stationary, unless,

- (a) the vehicles are operated by OC Transpo, Société de transport de l'Outaouais (STO), and Para Transpo in the course of providing transit service;
 - (b) the vehicles are operated by a private bus transportation company in the course of providing transportation services, and the vehicles are carrying passengers;
 - (c) operation of such engine or motor is essential to the basic function of the vehicle or equipment, including but not limited to, operation of ready-mixed concrete trucks, lift platforms and refuse compactors; or
 - (d) weather conditions justify the use of heating or refrigerating systems powered by the motor or engine for the safety and welfare of the operator, passengers or animals, or the preservation of perishable cargo, and the vehicle is stationary for purposes of actively loading or unloading.
- (2) Subsection (1) shall not apply to occupied motor vehicles when the temperature outside the motor vehicle is greater than twenty-seven degrees Celsius (27°C) including the humidex calculation or less than five degrees Celsius (5°C) including the wind chill value as determined by the Environment Canada temperature readings.

MUFFLERS

17. No person shall discharge into the open air, on any property other than a highway, the exhaust of any motor vehicle except through a muffler or other device which effectively prevents loud or explosive noises.

MOTOR SPORTS

18. (1) No person shall operate or permit the operation of racing competitions between motor vehicles on a property other than a highway within the City, whether or not an admission fee is charged, unless,
- (a) the competitions are held at a permanent facility;
 - (b) all motor vehicles are properly equipped with effective mufflers;
 - (c) such competitions are not carried out between 2300 hours of one day and 1000 hours of the next day.

AMBIENT SOUND LEVEL MEASUREMENT

25. (1) When a standard sound equivalent level (dB(A)) test cannot be used because ambient noise exceeds the maximum noise limit established for the device, vehicle or equipment to be measured, a differential reading may be used to isolate the level of noise contributed by the device, vehicle or equipment in question as follows:
- (a) a noise level reading shall be taken when the device, vehicle or equipment is not in operation;
 - (b) a noise level reading shall be taken when the device, vehicle or equipment is in operation; and
 - (c) where the noise level reading calculated in paragraph (b) exceeds the noise level reading calculated in paragraph (a) by 5 dB(A) or more, a noise violation exists.
- (2) No person shall use or operate or cause to be used or operated any device, vehicle or equipment, the noise from which has a level greater than 5 dB(A) above ambient noise levels, provided that the ambient noise levels are greater than the specified maximum level for the device, vehicle or equipment in question.

ENFORCEMENT

26. This by-law shall be enforced by the Chief of Police or by the By-law Officers of the City.

OFFENCE AND PENALTIES

27. (1) Every person who contravenes any provision of this by-law is guilty of an offence as provided for in subsection 429(1) of the *Municipal Act, 2001*, and all such offences are designated as continuing offences as provided for in subsection 429(2)(a) of the *Municipal Act, 2001*.
- (2) A person who is convicted of an offence under this by-law is liable, for each day or part of a day that the offence continues, to a minimum fine of \$500.00 and a maximum fine of \$10,000.00, and the total of all daily fines for the offence is not limited to \$100,000.00 as provided for in subsection 429(3)2 of the *Municipal Act, 2001*.
- (3) When a person has been convicted of an offence under this by-law, the Superior Court of Justice or any court of competent jurisdiction thereafter

may, in addition to any penalty imposed on the person convicted, issue an order

- (a) prohibiting the continuation or repetition of the offence by the person convicted; and
- (b) requiring the person convicted to correct the contravention in the manner and within the period that the court considers appropriate.

INTERPRETATION

28. (1) It is declared that if any section, subsection or part or parts thereof be declared by any Court of Law to be bad, illegal or ultra vires, such section, subsection or part or parts shall be deemed to be severable, and all parts hereof are declared to be separate and independent and enacted as such.
- (2) In this by-law, a word interpreted in the singular number has a corresponding meaning when used in the plural.
- (3) Schedules “A” and “B” annexed hereto are hereby declared to form part of this by-law.

REPEAL

29. By-law No. 2004-253, the Noise By-law, is repealed.

SHORT TITLE

30. This by-law may be referred to as the Noise By-law.

EFFECTIVE DATE

31. This by-law shall come into effect on the 30th day of September, 2017.

ENACTED AND PASSED this 12th day of July, 2017.

CITY CLERK

MAYOR

469238 B.C. Ltd. (c.o.b. Lawrence Heights) v. Okanagan Aggregates Ltd. (c.o.b. Motoplex Speedway and Event Park)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

P. Rogers J.

Heard: March 7-11, 14-18, 21-24, 29, 31 and April 1, 2016.

Judgment: April 22, 2016.

Docket: 105096

Registry: Kelowna

[2016] B.C.J. No. 829 | 2016 BCSC 721

Between 469238 B.C. Ltd. dba Lawrence Heights, Christopher Hrabchuk, Donald Krazanowski, June Schleusener and David Cromarty, Plaintiffs, and Okanagan Aggregates Ltd., dba Motoplex Speedway and Event Park (formerly known as Sunvalley Speedway Ltd.) and Fred Gilowski, Defendants

(197 paras.)

Case Summary

Civil litigation — Civil procedure — Injunctions — Circumstances when granted — Permanent injunctions — Prohibitive injunctions — Action by plaintiffs for damages for nuisance and for permanent injunction preventing escape of noise from motorcar race track allowed — Corporate plaintiff held lease for and was developer of residential area — Individual plaintiffs had sub-leases — Noise from operation of defendants' motorcar race track substantially and unreasonably interfered with plaintiffs' use and enjoyment of lease and sub-leases — Each of individual plaintiffs was awarded \$7500, except one who was awarded \$5000 — Corporate plaintiff was awarded \$100,000.

Damages — For torts — Affecting property — Real property — Nuisance — Action by plaintiffs for damages for nuisance and for permanent injunction preventing escape of noise from motorcar race track allowed — Corporate plaintiff held lease for and was developer of residential area — Individual plaintiffs had sub-leases — Noise from operation of defendants' motorcar race track substantially and unreasonably interfered with plaintiffs' use and enjoyment of lease and sub-leases — Each of individual plaintiffs was awarded \$7500, except one who was awarded \$5000 — Corporate plaintiff was awarded \$100,000.

Tort law — Nuisance — What constitutes nuisance — Private nuisance — Liability — Particular nuisance — Noise — Remedies — Action by plaintiffs for damages for nuisance and for permanent injunction preventing escape of noise from motorcar race track allowed — Corporate plaintiff held

lease for and was developer of residential area — Individual plaintiffs had sub-leases — Noise from operation of defendants' motorcar race track substantially and unreasonably interfered with plaintiffs' use and enjoyment of lease and sub-leases — Each of individual plaintiffs was awarded \$7500, except one who was awarded \$5000 — Corporate plaintiff was awarded \$100,000.

Action by the plaintiffs for damages for nuisance and for a permanent injunction preventing the escape of noise from a motorcar race track. The corporate plaintiff held a lease for and was the developer of a residential area. The individual plaintiffs had sub-leases. The plaintiffs alleged that noise from the operation of the defendants' motorcar race track interfered with the plaintiffs' use or enjoyment of their land. The individual plaintiffs claimed that they had a right to live on their lots without being irritated by the noise. The corporate defendant said that the noise made lots in part of the development unmarketable. The racing happened on 10 to 18 afternoons and evenings during the summer months. The surrounding area comprised a mix of agricultural, suburban housing, trailer park housing and light industrial uses. HELD: Action allowed.

The governing limitation period was six years, as the plaintiffs' claims for pure economic loss did not arise from an injury to person or property. The noise substantially and unreasonably interfered with the individual plaintiffs' use and enjoyment of their sub-leases. When racing was underway, the noise was loud and irritating enough to drive the individual plaintiffs indoors or persuade them to leave the development altogether. They would otherwise have been sitting outside, tending to their gardens, reading, relaxing and entertaining. The noise was the antithesis of the kind of gentle background sounds that residents of a rural subdivision could reasonably expect to hear in their neighbourhood. The noise substantially and unreasonably interfered with the corporate plaintiff's use of its lease. The noise delayed the development of land that was well suited to it. Each of the individual plaintiffs was awarded \$7500, except one who was awarded \$5000 based upon his shorter tenure. The corporate plaintiff was awarded \$100,000. The defendants were enjoined from using their land for any purpose that would cause a level of noise exceeding 80 decibels averaged over a five-minute period measured at the point on the perimeter of the land most closely proximate to the development.

Statutes, Regulations and Rules Cited:

Limitation Act, s. 3(2)(a), s. 3(5)

Rules, Scale B

Township of Spallumcheen's Bylaw 1462,

Counsel

Counsel for the Plaintiffs: J.G. Hardwick, J.W.T. Robinson.

Counsel for the Defendants: R.N. Beckmann, R.K. Benham-Parker.

Reasons for Judgment

P. ROGERS J.

Introduction

1 The plaintiffs have interests in a residential area called Lawrence Heights. The corporate plaintiff holds the head lease for the land and is the developer of the site. The individual plaintiffs have sub-leaseholds in the development. The defendants own and operate a motorcar race track located a short distance away from Lawrence Heights. The plaintiffs allege that noise from the operation of the race track substantially and unreasonably interferes with their use or enjoyment of their land. They say that the defendants are causing a nuisance. The plaintiffs seek a permanent injunction preventing the escape of noise from the track or an award of substantial damages.

2 The parties have agreed that the claims against Mr. Gilowski be dismissed without costs.

3 The central issues in this case are whether the noise of cars on the track is frequent and loud enough to constitute an actionable nuisance, and if it is whether the appropriate remedy for one or all of the plaintiffs is an injunction or an award of damages or both.

The Facts

Facts Pertaining to 469238 B.C. Ltd.

4 469238 B.C. Ltd. was incorporated for the purpose of acquiring a lease of certain lands in the township of Spallumcheen, B.C. From its inception until approximately 2010, Mr. Lawrence Hrabchuk acted as 469's principal operating mind. From 2010 on, Mr. Lawrence Hrabchuk continued as an officer and director of 469 but he ceded day-to-day control of 469's operations to his son Christopher Hrabchuk.

5 In 1996, 469 entered into a lease with the Federal Government. The lease gives 469 tenure over approximately 80 acres of land located within what is commonly referred to as the Okanagan Indian Band Reserve 1. The land is held by Mr. Harvey and Ms. Tricia Lawrence under a certificate of possession. Mr. and Ms. Lawrence are members of the Okanagan Indian Band. They are known as the locatees of the property. In order to lease the land, 469 had to come to terms with the Lawrences and then had to present those terms for approval by bureaucrats at the Federal Government of Canada's Department of Aboriginal Affairs and Northern Development. This last step was necessary because the Federal Government holds the land in trust for the Okanagan Indian Band and, through their membership in the Band, in trust for the Lawrences.

6 The land is an irregular triangle lying north of Highway 97 between the township of Spallumcheen (roughly ten kilometers west of Vernon, B.C.) and that Highway's intersection with the Salmon River Road. The land is elevated above the highway. Views of Okanagan Lake can be had from the southwestern edge of the property. The northeastern edge offers pleasant views of the Spallumcheen Valley. The land comprises two terraces. The lower terrace is the larger of the two. The upper terrace is roughly a quarter the size of the lower. The upper terrace is in the northwestern tip of the rough triangle formed by the leased parcel.

7 469 named its venture on the leased lands "Lawrence Heights".

8 469's purpose in leasing the land was and is to develop a particular style of residential neighbourhood

within its confines. To that end 469 entered into a dealership agreement with SRI Homes of Winfield, B.C. SRI manufactures modular homes. 469's business plan is to install the infrastructure - roads, water system, power, telephone, waste management and the like - necessary for a residential neighbourhood and to retail SRI homes to persons wishing to move into the development. 469 makes money from its markup on the price of the SRI manufactured homes it sells to its customers, on the fees that it charges its customers to make a lot ready to accept the home, on fees it charges to install and set up the home, on fees it charges to construct extras on the lot such as garages, shops, and decks, and it makes money on the rent that its customers pay under subleases that they enter into with 469 for the lots on which the customers' home are placed.

9 469 is content to allow other modular home manufacturers to sell residences to new sub-tenants as well. When that happens, 469 does not make a markup on the house itself. Instead, 469 charges the modular home vendor a fee for the privilege of placing its customer's new home on a lot in Lawrence Heights. The fee comprises partial recovery of 469's capital expenditure to install the development's infrastructure and it covers the cost to 469 of making the lot ready for the new home by constructing a driveway and foundation, connecting the home to services such as water, power, and telephone, and the fee covers the cost of any additional work that the new sub-tenant might commission. This "lot fee" started out in the late 1990s at \$10,500 and as of the trial date it has risen to approximately \$70,000.

10 469's overhead comprises the rent it must pay to the Federal Government under the head lease, the cost of building roads and providing services to the lots, and the cost of day-to-day operations such as road maintenance, trash collection, and upkeep of common areas.

11 The head lease expires in 2045. It provides for a minimum amount of annual rent and adjustments to the rent in five-year increments. Those adjustments are geared to the Consumer Price Index. The original lease also provides for deferment of a portion of the rent for the first six years of the lease or the sub-letting of the 150th lot, whichever first occurs. In 2002, the parties modified the head lease to extend the deferment period to the letting of the 150th lot and to raise the minimum rent from \$30,000 to \$60,000 per year. In 2006, the lease was modified again to raise the minimum rent to \$90,000 per year.

12 The Federal Government and Mr. Christopher Hrabchuk have performed calculations of 469's payable, paid, and deferred rents. The Federal calculations cover the period 1996 to the end of 2011. The Federal calculations are based on increases of the base rent that actually occurred in that period. For the period 2012 to 2015, Mr. Christopher Hrabchuk has performed his own calculations. He has estimated that the CPI will increase 469's base rent by 4.4 percent. The Federal Government has not yet confirmed that Mr. Christopher Hrabchuk's estimate is accurate. The chart attached as Appendix "A" contains these calculations.

13 Assuming that Mr. Christopher Hrabchuk has got it right, as of the end of 2015, the deferred rent totals \$730,000 (rounded). If the CPI formula results in an increase to the base rent greater than 4.4 percent, then the deferred rent total will be greater than \$730,000. If the CPI increase is less, then the deferred rent will be less as well.

14 Mr. Christopher Hrabchuk testified that 469 has successfully negotiated with the Lawrences for two further modifications to the head lease. The third modification would provide for an extension of the lease term for 17 years in return for annual rents plus a lump sum payment of \$264,500. Mr. Christopher

Hrabchuk testified that he came to that agreement with the Lawrences in 2013. The Lawrences have indicated their acceptance of those terms by letter signed July 26, 2013. The proposed extension of the head lease has not been formally accepted by the Federal Government. The letter agreement setting out the terms of the proposed third modification indicates that the parties consider that the price of the extension - \$264,500 - is the present value of the rents 469 might collect from all of the lots in the development over the 17-year extension period.

15 Mr. Christopher Hrabchuk testified that he does not expect to have difficulty raising the \$264,500. He said that he will collect the needful sum from 469's tenants as the price they must pay to obtain a 17-year extension of their sub-leases.

16 Mr. Christopher Hrabchuk testified that he expects there to be a fourth modification to the head lease. That modification would provide for forgiveness of the deferred rent in return for payment of a lump sum of \$185,500 and an increase in the annual rent to \$120,000 plus adjustments geared to inflation. Mr. Christopher Hrabchuk testified that he negotiated these terms with the Lawrences in November 2014, but that those terms have not yet been formally accepted by the Federal Government.

17 Mr. Christopher Hrabchuk is confident that the Federal Government will accede to the third and fourth modifications.

18 It is worth noting that historically, the Federal Government has entered into agreements with 469 on the terms agreed to by the Lawrences and 469. No evidence was led at trial to suggest that the Federal Government will not continue to follow that practice with respect to the proposed agreements to extend the lease and discount the deferred rent.

19 Mr. Christopher Hrabchuk testified that he expects 469 to be profitable even though he expects to have to pay the lump sums totalling \$450,000 plus increased rents to the Lawrences. The profit will come from the balance of the rents that 469 will collect from its sub-tenants.

20 469's target market is persons who are nearing or have reached retirement age. These are people who wish to downsize their accommodation without diminishing the quality of their lifestyles. 469 strives to offer a quiet, tidy, fully serviced, and well-maintained suburban neighbourhood that is pleasant but not ostentatious, affordable but not shoddy, and rural but not secluded. The evidence at trial satisfied me that the Lawrence Heights development in fact offers attractive amenities to its occupants. It is a desirable place to live.

21 469 prefers senior citizens for its sub-tenants. It does not cater to younger sub-tenants and, by charging extra rent for more than two occupants in a home, it actively discourages families from moving into the development. The neighbourhood is, therefore, comprised of a relatively homogenous group of retired persons.

22 The pace of development of Lawrence Heights was a subject of much discussion in the trial. As noted earlier, Lawrence Heights is located on two terraces that lie above Highway 97. 469 constructed the infrastructure of the lower terrace first. The construction proceeded in what might loosely be called phases. By correlating the phase development diagrams in trial Exhibit 4 with the annual sales data set out

in Schedule A of the agreed statement of facts, I have determined that the actual pace of development of Lawrence Heights from 1998 to the present is thus:

Year	Total Lots for Rent	Lots Rented	Total Lots Occupied	Occupancy Rate
1997	60	18	18	30%
1998	60	13	31	52%
1999	92	10	41	45%
2000	92	14	55	60%
2001	105	4	59	56%
2002	105	3	62	59%
2003	105	13	75	71%
2004	105	11	86	82%
2005	105	9	95	90%
2006	105	8	103	98%
2007	125	3	106	85%
2008	125	4	110	88%
2009	125	1	111	89%
2010	125	1	112	90%
2011	142	2	114	80%
2012	142	2	116	82%
2013	142	3	119	84%
2014	142	6	125	88%
2015	142	6	131	92%

23 The total development potential of Lawrence Heights is 202 lots.

24 All of the development to date is confined to the lower terrace. Lawrence and Christopher Hrabchuk both testified that what remains to be developed are several lots at the northern most edge of the lower terrace and another 50 to 54 lots on the upper terrace. They testified that they have not caused 469 to develop those lots because they consider the lots to be unsellable. They are unsellable because, according to the Hrabchuks, noise from racing operations at the defendants' race track renders those potential lots unmarketable. In their minds, the noise from the racetrack is such that no tenant of theirs would be willing to invest in a home and place it on one of the as yet undeveloped lots. For that reason they say that 469 is not willing to risk the capital expenditure - between \$750,000 and \$1.35 million - that would be necessary to build roads and install services for the remaining portion of the lower terrace and all of the upper terrace.

25 It is about the alleged damage to the development potential of these 50 or so lots that 469 complains in this proceeding.

Facts Pertaining to Sunvalley Speedway Ltd.

26 The speedway was conceived by Mr. Gary Hammond in or around 1999. Mr. Hammond caused his company Whiteline Trucking Ltd. to acquire the land and he arranged for the track to be built. The property on which the track is located is legally described as:

Lot A, Section 9, Township 7, ODYD, Plan KAP64279

27 The track is located across Highway 97 from Lawrence Heights. Its southern perimeter is west and slightly to the north of the northern-most tip of Lawrence Heights' upper terrace. Those two points are approximately 300 meters apart as the crow flies.

28 On Mr. Hammond's application, the township of Spallumcheen changed its zoning bylaw to permit the land to be used as an automotive racing facility. The zoning imposed a limit of 18 days of operation. It also limited the hours of operation from noon to midnight. Although the Township has a noise restriction bylaw, it saw fit to exempt the speedway from its application.

29 Mr. Hammond and Whiteline Trucking fell into financial difficulty. In or around 2003, Whiteline Trucking was placed in receivership. In 2004, Whiteline sold the speedway to 687309 B.C. Ltd. The principals of that corporation were Mr. Rhodes, Mr. Fraser, and Mr. Gilowski. In or around 2007, Mr. Gilowski caused his company Okanagan Aggregates Ltd. to purchase Mr. Rhodes' and Mr. Fraser's shares in the numbered company. Later, Okanagan Aggregates bought Mr. Gilowski's shares in the numbered company. The numbered company changed its name to Sunvalley Speedway Ltd. Finally, Okanagan Aggregates amalgamated with Sunvalley Speedway. In the result, by 2010 Okanagan Aggregates had assumed ownership and operational control over the track.

30 The speedway hosted its first race in August 2000. There was only one event that year. The number of racing events in the following years varied from year to year. Based on the parties' agreed statement of facts and the evidence of Messrs. Satchell and Newcombe, I have determined that the following table accurately describes the number of days per year that racing occurred at the track:

Year	Minimum Number of Race Days
2000	1
2001	18
2002	20
2003	18
2004	11
2005	10
2006	10
2007	14
2008	14

2009	12
2010	11
2011	11
2012	7
2013	10
2014	2
2015	3

31 Mr. Newcombe has acted as manager of the racetrack since its inception. He testified as to the normal operation of the track and as to the types of vehicles that use it. I found Mr. Newcombe to be a reasonably careful witness. His evidence was credible and reliable. I accept his evidence where it touched on how the racetrack operates.

32 Race events at the track occur between mid-April and early October. There is no racing during the winter months. As a general proposition, racing happens every second Saturday in the summer. Sometimes a Saturday race was postponed or cancelled due to weather. Occasionally, the track allowed a particular class of race cars to practice on the track on the Friday before a Saturday race. When they occurred, Friday practices took place during daylight hours.

33 Saturday races sometimes involve afternoon practice for some classes. Normally, though, racing commences with qualifying runs at 6 p.m. Qualifying involves one car doing three laps on the track. Qualifying is usually finished by 7 p.m. Actual racing starts then.

34 On a usual race day, three or four classes of car race, one after the other. Several classes involve small lightly-powered vehicles. These classes include: Cascar Juniors with 9 hp Honda motors; Dwarfs with air-cooled 750 cc motors; Baby Grands and Legends with air-cooled 1-liter or smaller engines; street stock cars; and B.C. Old Timers with their 230 to 250 c.i. 6-cylinder motors. These classes of vehicles are all equipped with reasonably effective exhaust mufflers. They do not generate enough noise to be bothersome beyond the perimeter of the race track.

35 Several other classes of race cars are, however, powerful and loud. The three general species of loud classes are Sprint cars, Sportsmen cars and trucks, and NASCAR series vehicles.

36 Sprint cars are open wheel vehicles. Some run on a type of fuel that, when exhausted from the car, leaves an unpleasant odor in the air. Sprint cars are much louder in operation than a normal street legal vehicle.

37 Sportsmen-type racers look like conventional passenger cars or pickup trucks, but have shell-like bodies attached to purpose-built chassis. Sportsmen racers have 358 c.i. V8 motors. They have mufflers but are, nevertheless, considerably louder in operation than ordinary cars. Sportsmen race cars campaign under a number of different names such as Wescar and Supertruck.

38 NASCAR vehicles are purpose-built race cars. Their mufflers systems are rudimentary.

39 On two occasions - July 14 and 15, 2007, and July 19, 2008 - NASCAR brought open-exhaust race

cars to the track. They did 300-lap races in each year. These vehicles had no muffler systems installed at all. They were extremely loud; so loud that that while they were on the track no conversation could be had in the grandstands. The sound of the 2008 event was recorded by a sound engineer retained by 469 for the purpose of this proceeding. I will describe that sound more fully later in these reasons.

40 From 2009 on, all NASCAR vehicles arrived with some form of muffler. That did not make them as quiet as your grandfather's Toyota Camry, but it did reduce their sound level somewhat.

41 On a typical race day, there will be one or two sportsmen or NASCAR classes. They will race for one or two hours. A sprint class may race as well. Those races generate the greatest amount of noise. There are usually one or two races involving the lesser classes as well. Racing is often over at 10 p.m., although it can go as late at 11 p.m. if the races are held up by caution flags or mishaps.

42 The racetrack has a public address system. So that the people attending the race can hear the announcer, the volume of the PA must be high enough to be heard over the sound of the race cars.

43 In addition to competitive racing, Okanagan Aggregates has hosted several automotive spectacle events. These include monster trucks, hit to pass derbies, trailer towing demolition derbies, and "King of the Hill" events. None of these events generate an appreciable amount of noise within or outside the track's perimeter.

44 Mr. Newcombe performed technical inspections of all of the vehicles that used the track. The track imposes a noise limit on those vehicles. Signs are prominently posted at the track's entrance and racer registration areas. The signs indicate that the maximum noise permitted by a vehicle is 95 decibels. Mr. Newcombe tests the sound of the cars with a handheld sound level meter. He stands by the exhaust outlet and asks the operator to take the car's engine to 2,500 RPM. If the sound level exceeds 95 dB on his meter he does not let the car on the track until it is made to be quieter. Cars, when they race, run their engines at or near 8,000 RPM.

45 In or around 2010, Okanagan Aggregates made three changes in what it says was an effort to reduce the volume of sound emanating from the track. One change was to remove two public address loudspeakers from the infield of the track. That left only speakers facing away from the hill on which Lawrence Heights lies. The second change was to install fabric fence covering on the portion of the catch fence surrounding the track that faces Lawrence Heights. The third measure was to install a fabric curtain between a gap in trees at the perimeter of the track property - again at a location that faced Lawrence Heights. None of these measures was assessed by the sound engineers whose work I will discuss later. None of these measures was shown to have any effect on the volume of racetrack sound heard at Lawrence Heights.

46 As can be seen in the table above, a total of only five racing events were held in 2014 and 2015. Competitive racing has been significantly scaled back in those two years. There are several causes for that reduction. One cause was Mr. Newcombe's personal circumstances - in 2013 his wife was ill and, sadly, she passed away in 2014. This was very difficult for him. He was not able to devote as much time as before to scheduling and managing the track's operations. Another cause was a shift in Mr. Newcombe's employment. In or around 2014 he accepted a new position based in Merritt, B.C. where he looks after a fleet of heavy machinery owned by one of Mr. Gilowski's companies. Yet another cause was the fee

charged by NASCAR to sanction that series racing events at the track. As Mr. Satchell, Okanagan Aggregates' financial controller, put it the fee and the amount of work required to host a NASCAR event outweighed the benefit of having those race events. Further, there was a lack of sponsorship and fan interest. Finally, the racetrack as a whole has never been profitable. Individual race events do make money for Okanagan Aggregates, but year on year the track costs the company more than it generates. Mr. Gilowski has instructed Mr. Satchell and Mr. Newcombe to wind down operations.

47 There are no official race events scheduled to take place at the track in 2016. It is too late now to contract with NASCAR to bring its cars to the track. It is an open question whether other classes will or will not race in the summer of 2016.

48 While the racetrack is relatively dormant at present, that is not necessarily a permanent situation. It is a fully built and serviced facility. Local ordinances allow it to be in operation up to 18 days per year. Okanagan Aggregates or any subsequent owner could elect to reinitiate racing in the years to come.

Sound

49 Evidence concerning sound emanating from the racetrack came from two general sources. One source comprised the reports and testimony of experts in the field of capturing, collating, and interpreting sound data. The evidence from these experts was largely quantitative, although it has to be said that the playback of a selection of their recordings made a significant subjective impression upon me.

50 The other source of sound evidence was the personal recollection of people who experienced racing sounds while inside Lawrence Heights. These people included residents of the development and the defendant's representatives Messrs. Satchell and Newcombe. This second source was subjective and anecdotal.

Sound Experts - Acoustical Engineers

51 The acoustical engineers who testified at trial used various terms to describe the sound levels they recorded while on 469's property. The actual volume of sound was expressed in decibels. Each 10 dBA increase in sound level equates to a doubling of the sound in the listener's perception. An increase of 20 dBA is a fourfold increase. Background, or ambient, noise is the level of noise normally present in the environment. A quiet environment has a background sound level on the order of 35 to 45 dBA.

52 The plaintiffs arranged for sound engineers to capture and record the sound of race events on July 19, 2008 and September 25 and 26, 2010. The defendants had their sound engineers attend at 469's property on June 22, 2014.

53 Oddly, all of the empirical studies were carried out on 469's property. No one thought to measure the level of sound of racing within the race track or at the perimeter of its grounds. It is not, therefore, possible to know by how much the sound at its source is attenuated by geography and distance between the track and Lawrence Heights.

Brown Strachan Study

54 The July 19, 2008 event involved a two-hour long NASCAR race followed by a shorter race of street stock cars. The NASCAR vehicles had no exhaust mufflers at all. Nineteen cars started the race, 13 finished it. Mr. Peterson of Brown Strachan Associates recorded the event. He set up a microphone at the

northwest corner of 469's leasehold. That point had a clear line of sight across Highway 97 to the racetrack below. The parties arranged for the recording to be played back in court. Mr. Peterson organized the playback equipment so that the sound level at the bench was the same as the sound level on the property on the night of the race.

55 Mercifully, the playback in court of this event was limited to approximately 45 seconds. The sound was absolutely deafening. It was painful. There was no hope of having any conversation in the courtroom while it was going on. Halfway through this experience my only hope was that it would end soon.

56 The volume of sound from the 2008 NASCAR race did vary. At one point the race cars slowed for a time. The sound from the track during this period was less than peak volume, but was still incredibly loud. Mr. Peterson charted the noise levels of the races that night. The peak noise level was approximately 93 dBA. The average noise level during the two-hour NASCAR race was 86 dBA. The much shorter street stock race generated noise peak noise levels of 80 dBA and the average level of that race was 77 dBA. Mr. Peterson's measurement of the background noise at the site was 37 dBA.

FFA Study

57 On September 25 and 26, 2010, Mr. Luna, a technician employed by FFA Consultants of Calgary, Alberta, captured and recorded the sound of a race event. The vehicles racing that night were Sprint cars, sportsmen cars, street stock cars, and street legal vehicles in a "King of the Hill" entertainment feature.

58 Mr. Luna set up recording devices at two fixed locations. Location one was at the northwest corner of the property similar to if not exactly at the same spot that Mr. Peterson had used. The second location was on the western edge of the upper terrace and perhaps 100 meters southeast of location one. Location two did not have a clear line of sight to the race track.

59 Mr. Luna also took spot measurements of sound levels at other locations within 469's leasehold. Three of those locations were on the lower terrace at the northern extent of the occupied lots. For those locations the upper terrace acts as something of a shield to sound from the racetrack.

60 Mr. Faszer, a sound engineer with FFA Consultants, played snippets of the sound of racing in court. He used the same playback method as Mr. Peterson. The noise from the September 2010 event was somewhat less than the noise of the 2008 race. It was still extremely loud. Normal conversation was impossible within the courtroom while the playback was on. In fact, the noise from the playback was so loud that shouting would probably have been ineffectual. I noted that Mr. Hardwick was driven to use hand signals to get Mr. Faszer's attention, so that he could shut the thing off.

61 The FFA study showed that at location one, i.e.: the northwest bit of 469's property closest to the racetrack, the peak sound levels during the race were on the order of 82 dBA to 92 dBA and the average level during one-minute samples was on the order of 76 dBA to 85 dBA. At location two the sound levels tended to be 8 dBA lower than at location one. The sound levels at the spot measurement locations, i.e.: spots within the developed area of Lawrence Heights, tended to be 7 to 15 dBA lower than at location one.

62 When there was no racing going on that evening, the one-minute average background noise level varied from a high of 58 dBA at location one to a low of 44 dBA at location two. This noise was

generated in large part by traffic on the highway below Lawrence Heights. That noise was played back in the courtroom. While audible, it was not so loud as to interfere with normal conversation. Subjectively, the traffic noise struck me much like the susurrant of small waves on a beach.

63 FFA did not measure the background non-racing level of noise in Lawrence Heights' developed area.

64 As a general proposition, then, the September 25 and 26 racing event generated noise in the upper terrace of 469's property that was roughly 20 dBA greater than the background or ambient noise in the area.

Wakefield Study

65 On June 22, 2014, Mr. Williamson of Wakefield Acoustics measured sound levels on Lawrence Heights' property. On that day, racing practice, qualifying laps, and races began at approximately 12:30 p.m. and continued until approximately 6:30 p.m. Mr. Williamson's report indicates that 12 cars were on the track. However, no one at trial identified the classes of cars that participated in racing that day.

66 Mr. Williamson set up his recording equipment at four locations. Site 1 was in the northwest corner of the property, at essentially the same spot as was used by Brown Strachan and FFA. This location is the most exposed to the racetrack. Mr. Williamson's site 2 was approximately 10 meters east of site 1. Site 3 was on the western ridge of the upper terrace but some 280 meters southeast of site 1. Highway 97 is immediately below sites 1 and 3. Mr. Williamson's site 4 was approximately 140 meters east of site 1. Site 4 was about as far from the track on the upper terrace as one can get.

67 Whatever types of cars were racing when Mr. Williamson recorded them, they were significantly quieter vehicles than the cars that Messrs. Peterson and Luna recorded. At site 1 - the one location that was common in all three studies - Mr. Williamson's measurements were between 6 dBA and 12 dBA lower than the levels recorded for the two earlier race events in 2008 and 2010. Nevertheless, at site 1 Mr. Williamson recorded maximum sound levels between 73 dBA to 86 dBA and an average over 15 minutes of 67 dBA. The average ambient noise from the highway - i.e.: non-racing noise - at site one was 55 dBA.

68 The sound levels at sites 2, 3, and 4 were uniformly lower than at site 1. The measurements at site 4 - the spot on the upper terrace furthest from the track - were limited to sounds heard there between 4 and 6:30 p.m. For that reason the levels of sound at site 4 may not be directly compared to the levels at the other locations.

69 Mr. Williamson's report stated that a background noise level of 60 dBA is sufficient to significantly interfere with normal conversation and sleep patterns. He also stated that the number of cars on the track does not significantly influence the sound of racing. He said that a doubling of the number of cars will increase the sound level by only 3 dBA.

Anecdotal Evidence

Mr. Christopher Hrabchuk

70 Mr. Christopher Hrabchuk lived in Lawrence Heights from the summer of 2006 until 2013 when he and his wife and young children moved to Vernon, B.C. The Hrabchuks left Lawrence Heights because

their children were reaching school age and there are no schools within easy commuting distance of Lawrence Heights.

71 The Hrabchuks occupied Lot 62 in the development. Lot 62 lies approximately in the middle of the park's north-south axis and on the easterly side of that line. The lot is further away from the racetrack than are the majority of lots in Lawrence Heights.

72 Mr. Hrabchuk testified that he did not hear the sound of racing in the summer of 2006. In 2007 he was aware of cars using the track. He said that it seemed that the track was in use every second weekend. Often there was practicing on the Friday and racing on the Saturday. Mr. Hrabchuk said that the sound of cars racing on the track was clearly audible outside his residence. He described the noise as very aggravating. It was like constant thunder or a swarm of bees. The noise was such that he and his family would retreat to their house where they would watch television rather than enjoy the summertime evening. He said that he would not invite friends or family to their house on a race day because the noise was so intrusive. Sometimes the Hrabchuk family would leave their home on race days. They would go to a park or the lake to enjoy activities without the bother of noises from the track.

73 The noise from the track was, according to Mr. Hrabchuk, essentially unchanged through the summer racing seasons of 2007 to 2013 inclusive. The noise was much less of a bother in 2014 and 2015 because there were far fewer race events in those years.

Mr. Allen Hossie

74 In the summer of 2006, Mr. Hossie and his wife moved into a home on Lot 88. Mr. Hossie is 71 years old. He is retired from his careers as a rehabilitation supervisor for Worksafe B.C. and as a coroner for the Province of B.C.

75 Mr. Hossie was aware of the race track's location. He knew that it was in operation before buying a home and sub-leasing his lot. Mr. Hossie was under the impression that the track was obliged to install noise abatement measures and that, because it had been licensed to operate, its operation would not impinge on his enjoyment of his property. Mr. Hossie candidly admitted that he was a bit naïve about the race track; he did not expect that the noise of racing at the track would be as loud and as intrusive as it turned out to be.

76 Mr. Hossie's lot lies approximately in the middle of Lawrence Heights' lower terrace. He testified that the noise of practices and races on the track is intrusive and annoying. He said that when a race is on it is not comfortable to stay outside his house. He goes inside and tries to watch television or read. Even inside his house, though, the race noise is such that it interferes with his enjoyment of those activities.

77 Mr. Hossie said that the race noise is such that when races are underway he cannot invite friends for dinner or to socialize.

Ms. June Schleusener

78 Ms. Schleusener is 73 years old. She is a homemaker. She lives with her husband on Lot 74. Lot 74 lies on the eastern side of the Lawrence Heights development. From her leasehold, her view is out over the Spallumcheen Valley. The Schleusener's lot is separated from the race track by Highway 97 and by Lawrence Heights' undeveloped upper terrace.

79 Ms. Schleusener and her husband selected Lawrence Heights for their retirement living because it was a quiet, well kept, neat, and pleasant community. Ms. Schleusener enjoys gardening. She keeps flower and vegetable gardens and has fruit trees in her yard.

80 The Schleusener's moved onto Lot 74 in 2003. They knew that the race track was in the vicinity. Ms. Schleusener understood that the track was under receivership and, by the overgrown and abandoned look of the place, assumed that it was not operational.

81 However, in 2004, she discovered that the race track was again hosting race events. Ms. Schleusener testified that the noise from racing is such that she and her husband retreat indoors and close the windows of their house. She said that she would like to work in her garden on a long warm summer evening, but that the noise of racing is so annoying that it drives her inside. The car racing was bad enough, but she said that the one time that "semis" (by which she meant large tractor trucks used to pull semi-trailers) raced the noise was tremendously loud and the smell of diesel exhaust was pervasive and unpleasant. In her words: "It stank".

82 Ms. Schleusener said that the racing seemed to be every two weeks during the summers of 2004 through to 2013. Noise came from the track on Fridays and throughout the day on Saturdays. She testified that the frequency of racing decreased in 2014 and 2015.

Mr. David Cromarty

83 Mr. Cromarty lives on Lot 103. His lot is on the western edge of the lower terrace. He has a view from his large deck. His view is of the valley bottom south to the shore of Okanagan Lake and of the lake and its bordering mountains "halfway to Kelowna". Mr. Cromarty selected his lot in large part because of that view. From his lot he cannot see the racetrack.

84 Mr. Cromarty moved onto Lot 103 in May 2000. He described Lawrence Heights as a very pleasant community. It has wide curving streets, large lots, and neat, well-kept residences. There is a pride of ownership there. Mr. Cromarty contrasted Lawrence Heights with a nearby development called Coyote Crossing. For reasons that will become clear later, this contrast is germane to the case. Mr. Cromarty has visited Coyote Crossing. He describes it as a trailer park. The streets are narrow and straight. The lots are small. It is, to his eye, a very basic development and it is not at all comparable to Lawrence Heights.

85 In any event, Mr. Cromarty's evidence was that he could hear noise from the track as soon as race events started there in 2001. Mr. Cromarty described the noise of racing as very, very, loud. It was a shocking noise. The noise was so great that he could not have conversation out on his deck. Inside his house the noise was still intrusive and annoying. It disturbed his sleep. Mr. Cromarty developed a system of checking the local newspaper for advertisements for upcoming race events. He and his wife abandoned their home on race weekends in order to avoid the noise of the event. He would tell his children to not come to visit them at Lawrence Heights on a race weekend.

86 Mr. Cromarty did not keep track of the number of race events in a summer. He felt that there were races every other weekend through until approximately 2014. He agreed that there were far fewer races in 2014 and 2015 than in previous years.

87 Mr. Cromarty is not bothered by the noise from traffic on Highway 97, which runs approximately 150 meters down and away from Lot 103. He testified that only rarely does that traffic impinge on his mind. That is when an emergency vehicle goes by with its siren wailing.

Ms. Patricia Rogers

88 Ms. Pat Rogers lives on Lot 17. She and her husband moved into Lawrence Heights in August 1999. They selected Lawrence Heights over other developments for its quiet rural setting, wide streets, underground services, and nice homes. Lot 17 lies along the western edge of the development, a few lots south of Mr. Cromarty's residence. Like Mr. Cromarty, the Rogers' have a view south across the valley and out over Okanagan Lake.

89 Ms. Rogers' first experience with noise from the racetrack happened in the early 2000s. She and her husband were visiting neighbours. They were sitting outside having social conversation. When racing started, the noise of the motors, tires, and public address system was so loud that they could not talk to one another. They had to pack up and move inside. Ms. Rogers testified that this is true whenever a race is on; the noise is too loud to permit her to enjoy being outside her home on a summer evening. The Rogers often travelled in the summer - sometimes they planned their travel to avoid race weekends, sometimes their absence was a coincidence. However, when they were at home on a race weekend, intrusive noise from the track sometimes started on Fridays and was present during practice and race sessions on Saturdays. Sometimes the track would be noisy on Sundays as well.

90 Ms. Rogers testified that although Highway 97 is downhill and a bit south of her lot, she is not bothered at all by traffic noise. She described the highway traffic as "white noise". Only occasionally will she hear the squeal of brakes when a motorist makes a sudden maneuver. Equally occasionally she hears the siren wail of a passing ambulance. Otherwise the highway does not interfere with her use and enjoyment of her home, nor does it disturb her sleep.

Mr. Donald Krazanowski

91 Mr. Krazanowski is a 75-year-old retired member of the Canadian Armed Forces. He lives in Lawrence Heights on Lot 34. His house is approximately in the middle of the southern end of the lower terrace. Mr. Krazanowski looked at a number of suburbs before settling on Lawrence Heights. He selected Lawrence Heights for its peaceful environment and large lots. Mr. Krazanowski moved onto Lot 34 in June 2004.

92 Mr. Krazanowski finds the noise from racing at the track annoying. The noise is such that he and his wife do not enjoy sitting outside on their deck on a Saturday evening in the summertime. The noise drives them indoors where they stay with the doors and windows shut while racing is going on.

Mr. Richard Hagman

93 Mr. Hagman is a 75-year-old retired teacher. He lives on Lot 6 in Lawrence Heights. Lot 6 is at the extreme southern end of Lawrence Heights. Mr. Hagman's house is, therefore, about as far away from the racetrack as it is possible to get and still be inside Lawrence Heights. Mr. Hagman moved into Lawrence Heights in May 2013.

94 Mr. Hagman testified that he and his wife are away from home quite a bit. By his estimate, he has

heard noise from about three racing events over the nearly three years that he has lived at Lawrence Heights. Mr. Hagman said that he could hear the sound of racing out on his deck and to a lesser degree inside his house. The noise does not bother him. Mr. Hagman testified that he has never had to alter his behaviour due to racing noise.

95 Mr. Hagman testified that on one occasion he and his wife walked from their home to the upper terrace and out onto the western ridge that overlooks the racetrack. That would have put them near to the northwest corner of 469's property. From that location, Mr. Hagman could see down into the racetrack. There was a race going on. He described the cars as older 40's and 50's type cars. He allowed as to how the noise from that race was louder at that location than it was at his house. He also allowed as to how having to hear that noise if you were living in that area could become annoying.

Ms. Judy Robinson

96 Ms. Robinson is a 65-year-old office administrator. She and her husband live in Lawrence Heights on Lot 27. Lot 27 is in the southwestern portion of the lower terrace. It lies across a cul-de-sac from lots that border the western edge of the development. The Robinsons moved into Lawrence Heights in May 2006.

97 Ms. Robinson testified that she can hear the sound of racing from her house. Although she described the noise as loud, it is not horribly loud. She does not find the sound intrusive or annoying. She has not had difficulty conversing while outside during a race event. Her guests have not displayed any sign of displeasure over sounds from the track.

Messrs. Barrie Satchell and Bob Newcombe

98 Mr. Satchell and Mr. Newcombe attended at Lawrence Heights on several occasions during race events. They confined themselves to the roadways within the developed portion of Lawrence Heights. They had with them the handheld sound meter that Mr. Newcombe uses to test cars at the track. Mr. Newcombe testified that at no place within Lawrence Heights did he measure race sounds exceeding 65 on his meter. Mr. Newcombe could not say whether what he saw on his meter's gauge represented decibels, or dBA, or maximum or minimum or time averaged sound levels. The two men said, however, that they had no difficulty conversing with one another while they were in Lawrence Heights. The loudest noise they experienced there was the sound of a resident's lawn mower.

Appraisal Evidence

99 The plaintiffs adduced property value evidence via a report authored by the real estate appraiser Mr. MacDougall. The defendants tendered a report by Mr. Rizzo, also an appraiser. Mr. Rizzo's report was a critique of Mr. MacDougall's opinion.

100 Mr. MacDougall and Mr. Rizzo are equally qualified property value appraisers. They have expertise in assessing the investment value of, among other things, modular home developments like Lawrence Heights.

MacDougall Report

101 Mr. MacDougall's report focussed on the economic impact of racetrack noise upon on 469's business.

102 Mr. MacDougall's opinions were grounded on the assumption that operations at the racetrack rendered impossible the development of 80 lots in the Lawrence Heights site. Fifty-four lots are on the

upper terrace, the remainder are on the northern portion of the lower terrace. It is important to appreciate that Mr. MacDougall did not pretend to say that in his opinion the racetrack had in fact prevented the development and letting of these 80 lots. Instead, his opinion was based upon that proposition as a given - he was not asked to analyze or defend it, nor did he try to.

103 Mr. MacDougall expressed his opinion in two ways. One way was to assess the difference between how much money a third party would be willing to invest in order to achieve the net cash flow generated by letting 202 lots - i.e.: all of 469's property - as opposed to the lesser net cash flow generated by letting only 122 of those lots - i.e.: those lots the development of which is not affected by racetrack noise. To reach his opinion on this topic, Mr. MacDougall made a number of assumptions. He assumed that the income and expense figures in 469's financial statements are accurate. Mr. MacDougall assumed that the sale of homes did not or would not add to 469's profitability. He assumed that 469 would be obliged to pay the base rent required of it by the head lease. He did not, it must be noted, consider the effect on 469's finances of the two proposed amendments to the head lease. Those proposed amendments - amendments upon which the Hrabchuks testified they expect to rely on and upon which they plan to operate 469's business - have to do with adding 17 years to the term of the head lease and discounting the deferred rent that has accrued to date. Finally, Mr. MacDougall assumed that a prudent investor would employ a capitalization rate of 8 percent. Given all of those assumptions, Mr. MacDougall opined that as of the close of 2012, the market value of a 202 lot Lawrence Heights was \$6.3 million while the market value of a 122 lot Lawrence Heights was \$3.44 million, giving a difference of \$2.87 million. That number, \$2.87 million, represents Mr. MacDougall's assessment of how much less an investor would pay to acquire 469's net cash flow for 122 lots as opposed to 202 lots.

104 Mr. MacDougall's second approach to valuing the cost to 469 of the assumed impact of racetrack operations was to look at the time frame within which 469 could have developed and let all 202 of its lots. Mr. MacDougall called this his absorption study. Mr. MacDougall considered a number of factors here, including the pace of lot sales at a competing suburban development called Desert Cove and the general rate of real estate transactions in the North Okanagan. In arriving at his conclusion, Mr. MacDougall considered the actual number of lots that 469 sub-let in a year and then adjusted that number upward to take out of the account the assumed effect of the racetrack upon 469's sales volumes. The adjusted number was the number of lot sales that Mr. MacDougall opined that 469 could have made in that year but for the negative effect of the racetrack. For example, for the year 2001, which was the race track's first year of operation, Mr. MacDougall adjusted the four sales that 469 actually made in that year up to a projected total of six sales.

105 Mr. MacDougall did not make adjustments for the years 2000 and 2003. His rationale for that was that the racetrack was not yet operational in 2000 and he was told to assume that the racetrack was dormant in 2003.

106 Mr. MacDougall candidly admitted that he did not ground his opinion upon an algorithm or formula. His opinion is simply an exercise of judgment based upon his understanding of the market uptake for modular homes in new developments in the area.

107 Mr. MacDougall opined that absent interference by the racetrack in 469's business, it would have been able to fully develop and sub-let all 202 of its lots by the end of 2007. Mr. MacDougall calculated

that as of 2012 the value to 469 of the net revenue forgone by delayed development of lots in Lawrence Heights was \$1.46 million.

108 Further, Mr. MacDougall estimated that the 2012 value of net profits that 469 would have made by selling homes on all of its lots by the end of 2007 was \$4.24 million. He based that opinion in part upon the assumption that 469 made a profit of \$39,000 to \$49,000 for every lot on which a modular home was placed.

109 Mr. MacDougall also provided figures for these losses adjusted for a period of loss confined to 2004 to 2012. Those numbers were somewhat lower than are noted above, but not substantially so. I will not set out those numbers here because, for reasons I will explain later, I am compelled to give little weight to Mr. MacDougall's opinions.

Rizzo Report

110 Mr. Rizzo submitted a report criticising Mr. MacDougall's opinions. Mr. Rizzo attacked the assumption that underlies Mr. MacDougall's work, *vis*: that the racetrack has impaired or prevented the development and letting of 80 of Lawrence Heights' 202 lots. Reduced to its core, Mr. Rizzo's complaint with that assumption is that because 469 has not developed those 80 lots and has not put them on the market, one cannot confidently say that they would not have sold owing to the presence of the racetrack.

111 Mr. Rizzo also attacked Mr. MacDougall's opinion that, absent the racetrack, 469 would have been able to develop and sub-let all of its lots by the end of 2007. Actually, Mr. Rizzo did not attack that opinion. As it turned out and as Mr. Rizzo had to admit under cross-examination, he misread that portion of Mr. MacDougall's report. Mr. Rizzo believed, incorrectly, that Mr. MacDougall predicted that the lots would be sold out by the end of 2012. Given that misapprehension, Mr. Rizzo proceeded to expend a good deal of ink on market factors, including the 2008 financial meltdown and the advent of competition in the area, that in his opinion would have retarded the marketing of 469's inventory of lots.

Litigation History

112 In 2001, 469 issued a writ of summons and statement of claim against Whiteline Trucking and others. In that proceeding, 469 alleged that noise from the racetrack was a nuisance to 469. It claimed relief by way of injunction and damages. 469 did not prosecute that proceeding. Given the transfer of ownership of the track in 2004, 469's complaints and claims in that suit are now moot.

113 Over the years of operation of the track, Mr. Lawrence Hrabchuk has made numerous complaints to the Township of Spallumcheen. A few other residents of Lawrence Heights have likewise voiced to the Township their unhappiness about noise from the track operations. Other than one telephone call to the track to complain about late night operations, prior to 2009-2010 the defendants did not receive a direct complaint about noise from the track.

114 This proceeding was commenced in October 2009. This date is important because the defendants allege a defence under the *Limitation Act*. Mr. Lawrence Hrabchuk testified that the lawyer acting for him in 2009 advised him that the limitation period for a nuisance claim was two years. Therefore the plaintiffs' complaints in this matter were originally limited to track operations from 2008 on. Presumably, that meant from January 1, 2008 forward.

115 In July 2010, the plaintiffs obtained an order authorizing them to add Okanagan Aggregates Ltd. as a defendant. That order was necessary because Okanagan Aggregates had amalgamated with the track's owner 687309 B.C. Ltd. The order was silent as to any amendments to the plaintiffs' pleadings made necessary by the addition of Okanagan Aggregates.

116 In February 2013, the plaintiffs filed an amended notice of civil claim. No notice of trial had yet been filed. The amendments took into account the addition of Okanagan Aggregates as a defendant in the proceeding by virtue of its amalgamation with 687309 B.C. Ltd. and the status it then acquired as owner and operator of the track.

117 But the amendments did not stop there. At paragraph 15 of the notice of civil claim, the plaintiffs amended their allegation of the date on which the alleged nuisance commenced. Instead of the original allegation that the nuisance started in 2008, the plaintiffs now alleged that the nuisance commenced on February 13, 2004 (i.e.: the date that 687309 B.C. Ltd. acquired ownership of the track). The amendment to paragraph 15 effectively moved the plaintiffs' claim back by four years and four months from the commencement of the suit and by seven years and four months from the date of the amendment.

Parties' Positions

Plaintiffs

118 The plaintiffs seek an injunction, registrable against title, preventing all racing activity at the track. Alternatively, the plaintiffs say that a limited injunction should go; one that would keep the amount of noise emanating from the track to a level that would not constitute a nuisance to current and future residents of the lower and upper terraces at Lawrence Heights.

119 If granted, an injunction would address future harm. The plaintiffs claim damages for past harm. They say that the limitation period for claims of pure economic loss arising from nuisance is six years. They say that they should be permitted to rely on their amended pleadings to reach their damages claim back to February 13, 2004. Alternatively, the plaintiffs say that their claims should go back six years from the date of the amendment of their notice of civil claim. That would limit their damages claims to the period from February 15, 2007 forward.

120 To address past harm, the personal plaintiffs seek damages of \$7,500 to \$10,000 - the smaller award going to Mr. Christopher Hrabchuk on account of his short stay in the development and the larger awards going to the three other longer-term residents.

121 For its part, 469 seeks damages to compensate it for the cost to it of delayed development of some of the lots at the northern extreme of the lower terrace and all of the upper terrace lots. That award would, by 469's estimate, be substantial. How substantial? Mr. Hardwick, counsel for the plaintiffs, argued for awards as follows:

- Present value of delayed net lease revenue from 2004 to 2015: \$1.836 million
- Present value of delayed profit margin on home and lot sales: \$4.2 million
- Delay of net lease revenues from 2015 to eventual letting of all lots: \$0.3 million

122 469's damages claim totals \$6.336 million. These claims are derived entirely from Mr. MacDougall's report.

Defendants

123 The defendants assert that the limitation period for nuisance claims is two years. They say that the plaintiffs' claims cannot reach back as far as February 2004. At most, they say, the plaintiffs can claim for nuisance for the two-year period preceding the filing of their original pleading. That would limit the plaintiffs' claims to the period October 2007 forward.

124 The defendants say that the doctrine of statutory authority provides them with a complete defence to the claim. The statute upon which they rely is the Township of Spallumcheen's Bylaw 1462 and its successors. The authority conferred by the bylaw is the right to operate an automotive racetrack on the defendants' land. The defendants assert that the emission of large amounts of noise is an inevitable consequence of automotive racing and that it must therefore be the case that in passing the bylaw the Township intended to abrogate any right that the plaintiffs may have to complain about that noise.

125 Leaving technical defences aside, the defendants say that the evidence at trial did not go so far as to establish that the noise from the track is, in fact, a nuisance. They point to the fact that no one at Lawrence Heights complained directly to the track operator - evidence, they say, that the noise cannot have been all that bad.

126 Even if the noise at the northwest extreme of the upper terrace might amount to a nuisance, the defendants argue that that little piece of land would not be the site of a modular home anyway. The sound levels everywhere else in the development are demonstrably lower than in that northwest corner. So, according to the defendants, any nuisance that the plaintiffs have made out affects only a very small portion of 469's property. It is not, in their view, sufficiently significant as to amount to a substantial and unreasonable interference in the plaintiffs' use or enjoyment of their property.

127 In the event that liability goes against them, the defendants argue that the plaintiffs' delay in commencing and prosecuting their claim gives rise to the defence of laches and that the equitable remedy of injunction ought not be granted in their favour.

128 As for damages, the defendants maintain that the plaintiffs have not shown that they have in fact suffered a loss. The defendants say that the personal plaintiffs have not shown that their property values have been negatively affected by the racetrack. They argue that 469's claim for damages rests upon Mr. MacDougall's opinion which itself rests upon a proposition that has not been proven on the balance of probabilities. That proposition is, of course, that the pace of development and letting of 469's lots has been retarded by racetrack operations. The defendants argue that there is simply no empirical evidence to support that assertion.

The Law

General Principles

129 The tort of private nuisance is defined as the interference in the claimant's use or enjoyment of land:

Antrim Truck Centre Ltd. v. Ontario (Transportation), 2013 SCC 13, [2013] 1 S.C.R. 594 per Cromwell J. at paragraph 18. Cromwell J. explained the elements of the tort thus:

[19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. ... [Emphasis in original.]

130 At paragraph 22 of *Antrim*, Cromwell J. discussed the first element of the tort:

[22] What does this threshold require? In *St. Lawrence Cement*, [2008] 3 S.C.R. 392 the Court noted that the requirement of substantial harm "means that compensation will not be awarded for trivial annoyances": para. 77. In *St. Pierre*, [1987] 1 S.C.R. 906 while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that "substantially alte[r] the nature of the claimant's property itself" or interfere "to a significant extent with the actual use being made of the property" are sufficient to ground a claim in nuisance: p. 915 (emphasis added). One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. As La Forest J. put it in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, actionable nuisances include "only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes", and not claims based "on the prompting of excessive 'delicacy and fastidiousness'": p. 1191. Claims that are clearly of this latter nature do not engage the reasonableness analysis. [Emphasis in original.]

131 The court in *Antrim* then turned to the second element: whether the interference was unreasonable. *Antrim* concerned a complaint of nuisance against the Province of Ontario. The claim arose from the relocation of a public highway. As such, the assessment of reasonableness required the court to consider the utility of the Province's decision to relocate the highway. The utility of the defendant's action was not, however, the sole consideration in the court's consideration of reasonableness. Cromwell J. explained:

[25] The main question here is how reasonableness should be assessed when the activity causing the interference is carried out by a public authority for the greater public good. As in other private nuisance cases, the reasonableness of the interference must be assessed in light of all of the relevant circumstances. The focus of that balancing exercise, however, is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation.

132 Nuisance may arise as a consequence of a physical impact upon the claimant's property, as for example when a neighbour allows water to flood onto the claimant's land. It is not, however, necessary to the tort that the claimant's property itself be damaged. Nuisance may arise in the absence of physical damage, as for example when sound or odor travels from one property to another.

Injunctive Relief

133 In *Suzuki v. Munro*, 2009 BCSC 1403, Verhoeven J. succinctly set out the factors concerning the granting of an injunction in the case of nuisance by noise. He wrote:

[109] An injunction is an equitable remedy, and therefore the granting of one is discretionary: R.J. Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora: Canada Law Book Inc., 2000) at para. 4.10, *Boggs v. Harrison*, 2009 BCSC 789 at para. 141.

[110] A number of factors are relevant in determining whether or not to grant an injunction. The inadequacy of damages is frequently considered, along with the nature of the plaintiff's injury and the balance of convenience between the parties: Sharpe, *Injunctions and Specific Performance* at paras. 1.60-1.140, *Boggs* at para. 141, A.M. Linden & B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Canada Inc., 2006) at 594.

[111] In situations where the nuisance is likely to continue without the granting of the injunction, as is the case here once the interlocutory order ends and the Munroes are no longer enjoined from operating the air conditioner at night, the inadequacy of damages is easily satisfied: Linden & Feldthusen, *Canadian Tort Law* at 594.

134 As to the balance of convenience, Verhoeven J. observed that items in balance are the harm to the claimants compared to the reasonableness of the efforts that the defendants have or could make to eliminate the nuisance: *Suzuki* at paragraph 113.

Damages

135 An injunction can only address harm going forward; injunction cannot be a remedy for past loss. For that reason, where the nuisance has gone on for some time, it is common for the court to couple injunctive relief - which looks forward in time - with an award of damages - which redress harm done up to the date the injunction takes effect.

136 As with any award of damages, it is for the plaintiff to prove on the balance of probabilities that it has suffered a compensable loss. That the loss may not be amenable to calculation is no bar to the making of an award. Where a damage award cannot be determined by use of a formula or algorithm, the court will do its best to assess it.

Limitation of Claims

137 This claim arose in 2009. The *Limitation Act* in effect at that time provided for a two-year limitation period for, among other things:

- s. 3(2)(a) subject to subsection (4)(k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

138 The *Act* stipulated a six-year limitation period for other claims as follows:

- s. 3(5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

139 In cases where nuisance has arisen as a consequence of physical harm or damage to the claimant's property, the limitation period has been found to be two years: see for example *Low v. Petro-Canada Inc.*, 2001 BCSC 251; *ML Plaza Holdings Ltd. v. Imperial Oil Limited*, 2006 BCSC 352; and *Peace Portal Properties Ltd. v. Surrey (District)*, [1989] B.C.J. No. 533 (S.C.).

140 In cases of pure economic loss arising from a tort but not consequent to damage or injury to person or property, the limitation period has been found to be six years, see: *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61, at paragraphs 39 and 40:

[39] In general, however, the law distinguishes between "pure economic loss" and economic loss arising from a personal injury. This distinction is described by Professor Feldthusen in "Pure Economic Loss Consequent Upon Physical Damage to a Third Party" (1977) 16 *UWOL Rev.* 1 as follows:

Consequential economic loss is a financial loss which by definition is always claimed by the same party who has suffered physical damage. It is a loss one suffers because one has suffered physical damage ... Pure economic loss is a financial loss which is not consequent upon injury to the plaintiff's own person or property. [At 4; emphasis added. Cited with approval in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* (1990) 65 D.L.R. (4th) 321 (Fed. C.A.).]

No reason has been suggested to us as to why this reasoning would not apply in the context of the former *Limitation Act*, and the wording of s. 3(2)(a) -- i.e., "injury to person or property, including economic loss arising from the injury" -- strongly suggests that it does.

[40] Given the foregoing, and in particular the interpretation of "injury to the person" adopted in *Martin*, [1979] B.C.J. No. 1111 and *Arndt*, [1997] 2 S.C.R. 539 *supra*, I conclude that Mr. Moses cannot be said to have suffered economic loss arising from personal injury. I find, with respect, that the chambers judge erred in ruling that the plaintiff's claim for misfeasance in public office fell within s. 3(2)(a) of the *Limitation Act*. It follows that this claim was subject to a six-year, rather than a two-year, limitation and was thus not statute-barred.

[Emphasis in original.]

Defences

Statutory Authority

141 It is useful to note that the defendants do not rely, for this defence, on the fact that they have complied with the Township's zoning bylaw. To take that position would be to err. That is because a lawful activity may nevertheless constitute a private nuisance. In other words, compliance with bylaws and other regulations is not a shield against a nuisance complaint: *Milne v. Saltspring Island Rod and Gun Club*, 2014 BCSC 1088; *Suzuki v. Munroe*, 2009 BCSC 1403; *Kenny v. Schuster Real Estate Co.* (1992), 10 B.C.A.C. 126.

142 Instead, the defendants say that when it passed the zoning bylaw allowing automotive racing on the defendants' land, the Township enacted a law that abrogated any neighbour's right to claim that noise from racing on the track is a nuisance.

143 Statutory authorization is a relatively rare species of defence. In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, the Supreme Court of Canada considered the defence in the context of a claim of public nuisance. Writing for the Court, Major J. explained the defence:

54 Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the

nuisance is the "inevitable result" or consequence of exercising that authority. See *Lord Mayor, Aldermen and Citizens of the City Manchester of v. Farnworth*, [1930] A.C. 171 (H.L.), at p. 183; *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150; *Schenck v. Ontario (Minister of Transportation and Communications)*, [1987] 2 S.C.R. 289. An unsuccessful attempt was made in *Tock, supra*, to depart from the traditional rule. Wilson J. writing for herself and two others, sought to limit the defence to cases involving either mandatory duties or statutes which specify the precise manner of performance. La Forest J. (Dickson C.J. concurring) took the more extreme view that the defence should be abolished entirely unless there is an express statutory exemption from liability. Neither of those positions carried a majority.

55 In the absence of a new rule, it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue and the simplest to apply. That approach was expressed by Sopinka J. in *Tock*, at p. 1226:

The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

144 The defence of statutory authority succeeded in the case of *Sutherland v. Vancouver International Airport*, 2002 BCCA 416. There, the Court of Appeal held that when assessing whether the particular activity complained of was an inevitable result of the authorizing statute, the court may look at the processes that the parties went through before the statute was passed. Those processes may include public meetings, academic or empirical studies, engineering reports, and the like. In *Sutherland* those processes were squarely focussed on the issue of noise from airport operations. Considerable data on that issue were put to the authorizing agency ahead of its decision (see *Sutherland* at paragraphs 107 to 110).

Mitigation

145 The defendants pled the defence of mitigation. I did not understand Mr. Beckman, counsel for the defendants, to have seriously pursued that defence in the course of the trial or during final submissions. I consider the pleading of mitigation to have been abandoned.

Discussion

Limitation Period

146 It is always useful to know the perimeters of a claim for damages. For that reason I will begin my analysis of this claim with a discussion of the limitation issue. That issue, put bluntly, is whether the plaintiffs are correct when they say that the limitation period for pure economic loss arising out of private nuisance is six years, or whether the defendants have it right when they say that the limitation period is only two years.

147 As noted earlier, this claim is governed by the former *Limitation Act*. The key provision of that *Act* relevant to this matter is the two-year limitation imposed on claims described by s. 3(2)(a):

- s. 3(2)(a) subject to subsection (4)(k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty (emphasis added);

148 If the plaintiffs' claims are not of a type described in s. 3(2)(a), then by virtue of s. 3(5) of the *Act*, the limitation period for their claims is six years.

149 There is no contest or doubt about the fact that the plaintiffs' claims here are for pure economic loss. The evidence at trial did not suggest much less prove that the plaintiffs' property has been damaged or that the individual plaintiff's persons have been injured by the alleged nuisance (the plaintiffs did allege personal injury in their notice of civil claim, but those claims were abandoned). More particularly, 469's claims are entirely economic; it says that it has lost money and only money as a consequence of the noise emanating from the race track. The individual plaintiffs allege that their enjoyment of their property was negatively affected by the same noise, but they do not allege that their hearing has been damaged or the windows of their houses were broken by an assault of sound waves from the track.

150 To be certain that pure economic loss is different and distinguishable from the kind of claim arising out of injury to person or property as contemplated by s. 3(2)(a), one need only look to the discussion of the issue in *Moses v. Lower Nicola Indian Band* quoted above.

151 So, the question here boils down to a simple proposition: Do the plaintiffs' claims for pure economic loss arise from an injury to person or property? The answer to that question has to be: "No, they did not". For that reason I find that the limitation period that governs the plaintiffs' claims is six years.

152 I appreciate that the conclusion that I have reached may seem to run contrary to the two-year limitation periods that were found to apply in several earlier nuisance claims. Those cases are: *Low v. Petro-Canada Inc.*, 2001 BCSC 251; *ML Plaza Holdings Ltd. v. Imperial Oil Limited*, 2006 BCSC 352, and *Peace Portal Properties v. Surrey (District)*, [1989] B.C.J. No. 533 (S.C.). In my view, those cases are distinguishable from the present case. The distinguishing feature is that in each of those cases the plaintiff did suffer some loss or damage to his property. In *Low* contaminants escaped onto the plaintiff's property; *ML Plaza* was another case of escaping contamination; and in *Peace Portal Properties* the nuisance was the inundation of the plaintiff's lands by water.

153 Having answered the question of what limitation period applies here, the next question to tackle is: What effect did the plaintiffs' amendment of their pleadings have upon the scope of their claims? Recall that the original statement of claim sought to claim for nuisance from January 2008 forward. The original statement of claim was filed in October 2009. Given that the limitation period for their nuisance claim was in fact six years, it would have been right and proper for the plaintiffs to have claimed for nuisance commencing six years earlier, i.e.: from October 2003 forward.

154 Put another way, in law the plaintiffs had the right to sue for nuisances commencing in October 2003. Their legal right to sue was not truncated by their (or their lawyer's) decision to make a claim for nuisance from January 2008 forward. Having commenced the proceeding, the plaintiffs were always entitled to sue for the loss they suffered within the proper limitation period. The day after their original filing, the plaintiffs could have amended their pleadings to seek damages from October 2003 on.

155 In my view, the plaintiffs' February 2013 amendment - which asserted nuisance from February 2004 forward - did nothing more than give effect to the scope of claim to which they were always entitled but had mistakenly not originally claimed. The amendment did not cause the defendants any practical prejudice; they produced ample evidence of racetrack operations from 2004 to the date of trial. Never did the defendants complain that useful evidence was lost to them through the passage of time. There is, therefore, no need for the court to give leave to the plaintiffs to amend their claim as they have. That is because the amendment did not bring into a claim into play despite an already expired limitation period.

Nuisance

156 The analysis of a claim for private nuisance requires the court to consider two propositions: first, did the alleged nuisance substantially interfere with the claimant's enjoyment or use of his land; and second, was the interference unreasonable in all of the circumstances (see *Antrim* at paragraphs 19 to 22)? For the claim to succeed the evidence must answer both questions in the affirmative.

Substantial Interference

157 In the context of the individual plaintiffs, the use and enjoyment they say was affected was and is, in general terms, their right to live in their houses and on their sub-leased lots without being irritated by racetrack noise. The use of their land includes being able to sit in peaceful quietude on their outdoor decks on a summer Saturday afternoon and evening. The enjoyment that they say has been infringed is the pleasure they should have in residing in a quiet suburban environment.

158 In the context of 469's claim, its claim centers on use of its leasehold. The corporation, being a non-human entity, cannot be said to have suffered a subjective loss of enjoyment of its property. The use affected is, of course, the use to which 469 says it would put the land: sub-letting individual lots in order to generate a profitable stream of rental income and collecting what amounts to one-time land development fees for each rented lot.

159 Has the individual plaintiffs' use and enjoyment of their land been substantially affected by noise from the racetrack? Their evidence was to the effect that when racing was underway, the noise was loud and irritating enough to drive them indoors or to persuade them to leave Lawrence Heights altogether. The racing happened on 10 to 18 afternoons and evenings during the summer months. Summertime is the time of year when the plaintiffs would otherwise have enjoyed sitting outside, tending to their gardens, reading, relaxing, cooking and eating outdoors, and entertaining family or friends. Having a noise like someone running a chainsaw in the backyard, as Mr. Christopher Hrabchuk put it, would certainly be a substantial interference with those uses and enjoyments.

160 I am mindful of the evidence of Mr. Hagman, Ms. Robinson, and Messrs. Satchell and Newcombe that they did not find race noise to be a bother. I cannot give much weight to Mr. Hagman's evidence; he has lived in Lawrence Heights during the least active phase of the track's operations. He lives about as far away from the track as one can get and still be inside Lawrence Heights.

161 Ms. Robinson struck me as a very nice lady. She is clearly a tolerant individual. She appears to have a "live and let live" attitude, which is fine for her but does not necessarily make the individual plaintiffs out to be ultra-sensitive whiners.

162 When they visited the park during races, Mr. Satchell and Mr. Newcombe were not there to enjoy a restful evening or cookout on their decks. They confined their perambulations to the development's roadways and trails. I do not accept their evidence as representative of the impression that racing noise has had on actual residents. In any case, those two gentlemen had just come from the racetrack itself. For them, any place other than trackside was likely to seem quiet and peaceful.

163 I find that the individual plaintiffs have shown that noise from the race track has substantially interfered with their use and enjoyment of their land.

164 469's claim that its use of the leasehold has been substantially interfered with is a more difficult proposition. 469's evidence on this point lies in two general areas. One area was comprised of Lawrence and Christopher Hrabchuk's evidence that they noticed that fewer non-residents visited Lawrence Heights on race days and that must therefore mean that fewer potential customers to whom they could make their sales pitch, and their evidence that noise from the track made lots in the upper terrace unmarketable. The other area of evidence relating to 469's assertion that its use of its land was substantially interfered with was Mr. MacDougall's report. More specifically, that evidence was Mr. MacDougall's opinion that but for the race track 469 would have been able to sub-let all of its lots, including the lots on the upper terrace, by the end of 2007.

165 In my view, very few senior citizens, looking for a peaceful, quiet, and rural lot on which to place their retirement home would elect to sub-let lots on the western edge and northwestern tip of the upper terrace. At least, they would not make that election if they knew that between noon and midnight on as many as 18 days during the summer they would be subjected to the noisome roar of racing cars. The playback of racing noise from locations in those areas provides ample support for that prediction. For that reason I am inclined to accept the Hrabchuks' evidence that they have delayed development of the upper terrace because of the racetrack. As I will discuss later, I find that that is only part of the reason they have delayed, but it is an important part.

166 The lots on the western edge and northwestern tip of the upper terrace would otherwise be eminently sellable. I find that noise from the racetrack has in fact substantially interfered with 469's use of its leasehold.

167 I have said earlier that I will not give much weight to Mr. MacDougall's opinions. I will explain here why I cannot accept his opinion that but for the racetrack 469 would have been able to sub-let all of its 202 lots by the end of 2007. I find that there are two flaws in that opinion and they all have to do with the adjustments Mr. MacDougall made to 469's actual sales between 2000 and 2007.

168 The first flaw is that Mr. MacDougall gave no thought to whether 469 had the resources necessary to build the infrastructure necessary to put all of its 202 lots on the market before the end of 2007. There was no evidence at trial - other than bald assurances by Messrs. Hrabchuk - that 469 actually had the capital or the borrowing power or a combination of the two needed to finance that construction. Neither was there evidence that the infrastructure could be built at that accelerated pace. So, while the market demand might have been there, there was not sufficient evidence at trial to allow me to conclude that 469 would have actually developed all of its lots in time so that by the end of 2007 all of its lots would have had tenants on them.

169 The second flaw has to do with Mr. MacDougall's correlation of racetrack operation to lot sales in 2003. Mr. MacDougall testified that he was instructed that the racetrack was dormant in 2003. For that reason he made no adjustment to the sales figures for that year. However, there were in fact a total of 18 race events in the summer of 2003. That amounted to a full season of racing; the track used all of the days allotted to it under the Township's business regulation bylaw. The assumption on which Mr. MacDougall based his opinion was, therefore, demonstrably wrong. If that assumption was wrong then I can have little confidence in his assumption that racing affected lot sales in any other year in the period 2000 to the end of 2007.

170 For these reasons I find that I cannot rely on Mr. MacDougall's opinion to show that noise from the racetrack substantially interfered with 469's use of its leasehold in the period 2000 to 2007.

Unreasonable Interference

171 The second stage of analysis of a claim for nuisance is whether the interference was unreasonable in all the circumstances. The factors to consider in this phase of the discussion include the nature of the environment in and around the claimants' and defendants' properties, the use to which the area has been put historically, and the utility of the defendants' conduct.

172 I have described Lawrence Heights' environment earlier in these reasons. The surrounding area comprises a mix of agricultural, suburban housing, trailer park housing, and light industrial uses. The agricultural includes a large privately owned farm that lies across Highway 97 and directly south of Lawrence Heights. The suburb and trailer park uses include the Desert Cove and the Coyote Crossing developments that lie to the south of Lawrence Heights and to the east of the racetrack. The light industrial uses include a gravel pit on the far south side of the race track as well as a pre-cast concrete facility that is to the below and to the north of Lawrence Heights. Well to the east of Lawrence Heights are an 18-hole golf course and a tourist destination called the O'Keefe Ranch.

173 Lawrence Heights was the first significant development in the immediate area. When Lawrence Heights was first conceived and was first under construction the racetrack was essentially a large pasture. The racetrack was built in 1999 and opened for one race in 2000. Coyote Crossing started letting lots in 2000. Desert Cove started selling lots sometime after that. Generally speaking then, history shows that the area was initially largely rural but that development in and around Lawrence Heights has progressed on a gradual but persistent basis.

174 The defendants argued that there is public utility in the racetrack operations. They say that police and firefighters train there from time to time and that charities have received income by providing parking control, participating in liquor sales, and running 50-50 lottery games at the track. While all of this is no doubt true, these are very minor contributions to the public good. It cannot be said that the racetrack itself exists to serve any primary purpose other than to make money for Okanagan Aggregates.

175 I have no difficulty finding that the advent of noise from racing cars was an unreasonable interference with the individual plaintiffs. The noise of racing engines is the antithesis of the kind of gentle background sounds that residents of a rural subdivision can reasonably expect to hear in their neighbourhood.

176 It was not, in my view, unreasonable that 469 should have planned to develop the western edge and northwestern tip of the leasehold - that land is well suited to suburban development. The racetrack has interfered with that plan to a significant degree. The social utility the racetrack provides is minor and does not outweigh 469's financial interest in the leasehold. Further, there was no evidence at trial that Okanagan Aggregates could not involve charities in quiet events at the track or that limiting the amount of noise emanating from the track would somehow prevent emergency services personnel from training there.

177 Taking all of the foregoing into account, I find that noise from the racetrack does constitute an unreasonable interference in the use and enjoyment of the individual plaintiffs' sub-leases and of 469's use of the western edge and northwestern tip of the upper terrace.

178 In conclusion, then, I find that noise from the defendants' racetrack has constituted a private nuisance for the individual and the corporate plaintiffs.

Defence of Statutory Authority

179 The defence of statutory authority depends entirely on the defendant proving that the nuisance is the inevitable result of the activity authorized by the statute.

180 In the present case the defendants have adduced evidence that certain classes of race cars do not produce noise amounting to nuisance. Those classes include the old timers cars, the Baby Grand, and Hornet vehicles. Vehicles in some of these classes are essentially road-legal cars that enthusiasts have modified for safety while racing. The cars in these classes are equipped with either very small engines - Baby Grands - or are small displacement compact cars - Hornets. Their exhaust systems are equipped with effective mufflers. According to Mr. Newcombe, whose evidence on this topic I accept, these are genuine racing vehicles.

181 The evidence at trial did not go so far as to prove that in order for Okanagan Aggregates to operate a race track it was necessary that it host races involving cars with no or only rudimentary mufflers. Such vehicles include the NASCAR, Sportsmen, and Sprint vehicles.

182 Further, the evidence clearly established that Okanagan Aggregates can host non-racing events such as "King of the Hill" and trailer demolition spectacles without generating enough noise as to constitute a nuisance.

183 For these reasons I find that the defendants are not entitled to rely on the defence of statutory authority.

184 Careful readers will note that I have not addressed the difficult question of whether the Township of Spallumcheen could, through the passage of a zoning bylaw, abrogate a land owner's right to sue for private nuisance. Neither have I tackled the even more difficult question of whether, assuming that the Township does have that power, by exercising it could abrogate the rights of a land owner who is not within the Township's jurisdiction. That could be an issue because Lawrence Heights is on an Indian Reservation. The Township has no authority whatsoever over that land.

Remedy

Damages

185 The individual plaintiffs seek an award of damages for past nuisance. Ms. Schleusener and Messrs. Krazanowski and Cromarty seek \$10,000 each. Mr. Christopher Hrabchuk seeks an award of \$7,500. The lesser amount for Mr. Hrabchuk is based upon his shorter tenure in Lawrence Heights.

186 The defendants' approach to the assessment of damages for the individual plaintiffs was to point out that none of them have shown that the value of their leaseholds has diminished by virtue of the nuisance. That is, with the greatest respect to the defendants, a thoroughly wrong-headed approach. None of the individual plaintiffs ever presented a case for diminution of the value of their houses. They complained only about not being able to enjoy them in a reasonable manner.

187 In *Suzuki v. Munroe*, the court awarded damages of \$4,000 and \$2,000 to the plaintiff wife and husband respectively. There, the nuisance interfered with the plaintiffs' enjoyment of their property over a period of three years. The nuisance occurred whenever summertime temperatures triggered the defendants' air conditioner. The plaintiff wife suffered rather more badly than did her husband. She experienced considerable psychological upset from a combination of the nuisance and from having a running battle with the defendants over the air conditioner.

188 In my opinion, the harm that the individual plaintiffs suffered from the nuisance was less severe than the harm to Mrs. Suzuki, but they have experienced the harm over a longer period of time than she did. I think that a reasonable award of damages to Ms. Schleusener, Mr. Krazanowski, and Mr. Cromarty is \$7,500 and to Mr. Christopher Hrabchuk is \$5,000. An order will go accordingly.

189 I am persuaded that 469 has suffered damages as well. I do not accept Mr. MacDougall's opinion that the capital value of 469's loss is \$2.87 million. That number is not reliable because it is based upon the assumption that racetrack noise has and will permanently prevent 469 from developing the northern most lots on the lower terrace and all of the lots on the upper terrace. The fact is that since Mr. MacDougall expressed his opinion, 469 has developed and rented some of the lower terrace lots. That fact negatives the assumption Mr. MacDougall was instructed to employ and undermines the value of his opinion of 469's consequent loss.

190 I am not convinced that 469 should recover any damages relating to delay of development of the remaining lots on the lower terrace.

191 As I said earlier, I do not accept Mr. MacDougall's opinion that absent the racetrack by the end of 2007 469 would have developed and sub-let all of the lots on the lower and upper terraces.

192 The best that I can do with the evidence before me is to say that noise from the racetrack has caused some delay in 469's development of the upper terrace. In so saying, I have not lost sight of the fact that development and letting of lots in the upper terrace would certainly have triggered 469's obligation to pay the full amount of deferred rent under the head lease. The running total of deferred rent reached \$498,000 by the end of 2007 and reached just under \$600,000 by the end of 2011. The deferred rent now stands at a rounded \$730,000. I find that that contingent liability operated as another check on 469's ambition to develop the upper terrace. I find that it is very unlikely that 469 will develop the upper terrace before it perfects its agreement with Mr. and Ms. Lawrence to deeply discount the amount of deferred rent it owes.

193 Doing the best that I can with the admittedly imperfect evidence relating to the issue, I would assess 469's damages at \$100,000 for that element of delayed development of the upper terrace attributable to the nuisance. That sum is meant to compensate 469 for the net rental income stream and profit on house placements that it would have realized on lots on the upper terrace prior to the trial, but which it did not earn owing to delay of development of the upper terrace caused by the nuisance.

Injunction

194 As Verhoeven J. said in *Suzuki*, injunctive relief is appropriate where damages will be an inadequate remedy and the inadequacy of damages is easily satisfied where the nuisance will continue after trial if an injunction is not granted. That is clearly the case here. The defendants have a substantial investment in the racetrack and the Township has granted them authority to race on 18 days each year. If the use of the racetrack is not regulated by an injunction, the defendants or their successor(s) on title will be free to resume racing with any class or type of vehicle, including unmuffled NASCAR cars.

195 For that reason, to protect the plaintiffs and to permit 469 to develop lots on the upper terrace, the use of the racetrack must be subject to some limits.

196 An order will go that the owner and occupier of the land legally described as:
Lot A, Section 9, Township 7, ODYD, Plan KAP64279

is enjoined from using that land for any purpose that will cause a level of noise exceeding 80 decibels averaged over a five minute period measured at the point on the perimeter of the land most closely proximate to Lawrence Heights. That order may be registered by 469 against the title to the land.

Costs

197 The parties are at liberty to make an application for costs. Absent an application made within 30 days of the release of these reasons for a different result, the plaintiffs will be entitled to a single bill of costs on Scale B.

P. ROGERS J.

* * * * *

APPENDIX "A"

469238 B.C. Ltd. (c.o.b. Lawrence Heights) v. Okanagan Aggregates Ltd. (c.o.b. Motoplex Speedway and Event Park)

Lawrence Heights

CIDMS #2401292

CPI Calculations		%	Base 99,372	
1996-2001			\$99,372.00	Total minimum base rent per annum for the First period of the lease
2001-2006	<u>108-96</u> 96	0.125	\$111,793.50	Total minimum base rent per annum for the second period of the lease
2006-2011	<u>117.5-108</u> 108	0.0879	\$121,620.15	Total minimum base rent per annum for the Third period of the lease
2011-2015	<u>121.9-117.5</u> 117.5	0.044	\$126,971.44	Total minimum base rent per annum for the Fourth period of the lease

Year	Base Rent	Base Amount Paid	Sublease Registration fee paid per year	other	Total amount paid by Lawrence Heights per year	Deferment amount accrued per year	Deferment amount for the period
1996	99,372.00	30,000.00	0.00	0.00	30,000.00	69,372.00	During this period Rent was equal to 25% of revenue
1997	99,372.00	30,000.00	12,000.00	2,078.12	44,078.12	55,293.88	
1998	99,372.00	30,000.00	19,000.00	13,698.75	62,698.75	36,673.25	
1999	99,372.00	30,000.00	7,000.00	22,816.27	59,816.27	39,555.73	
2000	99,372.00	30,000.00	13,000.00	29,235.00	72,235.00	27,137.00	
2001	99,372.00	0.00	0.00	63,000.00	63,000.00	36,372.00	
2002	111,793.50	0.00	0.00	67,500.00	67,500.00	44,293.50	<u>266,403.86</u> First period deferment amount 2002-2006
2003	111,793.50	0.00	13,000.00	60,000.00	73,000.00	38,793.50	During this period rent was 60,000/ year
2004	111,793.50	0.00	10,000.00	60,000.00	70,000.00	41,793.50	
2005	111,793.50	0.00	6,000.00	60,000.00	66,000.00	45,793.50	<u>211,467.50</u> d period deferment amount 2006-current time
2006	111,793.50	0.00	11,000.00	60,000.00	71,000.00	40,793.50	
2007	121,620.15	0.00	4,000.00	95,000.00	99,000.00	22,620.15	During this period the rent \$90,000/ year
2008	121,620.15	20,000.00	3,000.00	90,000.00	113,000.00	8,620.15	
2009	121,620.15	0.00	1,000.00	90,000.00	91,000.00	30,620.15	
2010	121,620.15	0.00	1,000.00	90,000.00	91,000.00	30,620.15	
2011	121,620.15	0.00	1,000.00	90,000.00	91,000.00	30,620.15	
2012	126,971.44	0.00	3,000.00	90,000.00	93,000.00	33,971.44	<u>123,100.75</u> Third period deferment amount
2013	126,971.44	0.00	2,000.00	90,000.00	92,000.00	34,971.44	
2014	126,971.44	0.00	6,000.00	90,000.00	96,000.00	30,971.44	
2015	126,971.44	0.00	6,000.00	90,000.00	96,000.00	30,971.44	
SUM					1,541,328.14	<u>729,857.87</u>	Total Deferment Amount

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SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000843-173

DATE: August 21, 2018

BY THE HONOURABLE KAREN M. ROGERS, J.S.C.

FRANK BERDAH
-and-
9316-1305 QUÉBEC INC.
-and-
GIOVANNI PAQUIN
Applicants

v.

PROCUREURE GÉNÉRALE DU QUÉBEC / ATTORNEY GENERAL OF QUEBEC
Defendant

JUDGMENT

(Re-Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiffs)

JR1825

[1] Annoyances suffered by neighbours as a result of the ongoing construction work relating to the Turcot Interchange and other highways, interchanges and road links in the Montreal area is at the heart of these proceedings (the “**Project**”).

[2] The Applicants seek the Court’s authorization to bring a class action in injunctive and declaratory relief and damages against the Attorney General of Quebec (“**AGQ**”)¹ for the inconvenience and damages suffered by a defined class of residents who claim:

- The Project caused them abnormal neighbourhood disturbances, triggering the AGQ’s liability under the no-fault regime provided for at Article 976 CCQ;
- The ministère des Transports, de la Mobilité durable et de l’Électrification des transports (“**MTMDET**”), on whose behalf the AGQ is acting, violated their guaranteed rights to the peaceful enjoyment of their property,² and to a healthy environment;³ and
- The MTMDET is at fault for having failed to take the necessary steps to reduce the impact of the Project upon its neighbours and reduce the disturbances to an acceptable level.

[3] The Application was heard on January 22 and 23, 2018, at a time when the named Defendants included the AGQ, but also a consortium and its partners,⁴ **KPH Turcot, un partenariat S.E.N.C.** (collectively “**KPH**”), and a contractor, who was granted a design-built contract for certain work relating to the Project.⁵

[4] At the beginning of the second day of hearing, after the oral arguments of KPH’s attorney, the Applicants requested permission to discontinue the authorization proceedings against KPH, which discontinuance was granted at hearing, and a written Judgment followed.

¹ AGQ will also refer and include the ministère des Transports, de la Mobilité durable et de l’Électrification des Transports on whose behalf the AGQ is acting.

² CQLR, c. C-12, Article 6.

³ CQLR, c. C-12, Article 46.1.

⁴ Construction Kiewit Cie and Parsons Canada Ltd.

⁵ Exhibit P-4.

[5] In fact, throughout the hearing on the authorization, the Applicants were reactionary to the Defendants' oral arguments, which led to a significant modification to the class description, even at the beginning of the hearing.

[6] At the end of the hearing, Applicants sought authorization to produce a list of potential class members who had signed up to class counsel's website before the class description was modified.

[7] The Court authorized the production of the list⁶, but granted the AGQ until February 23, 2018 to set out in writing any arguments it wished to submit to the Court.

1. THE AMENDMENT TO THE CLASS DESCRIPTION

[8] On February 1st, 2017, Mr. Frank Berdah ("**Mr. Berdah**") and his company, 9316-1305 Quebec Inc., operating under the name of Galuchat ("**Galuchat**"), filed the first *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiffs* (the "**Application**"), against the AGQ and KPH, on behalf of the following group:

All natural and legal persons who have suffered damages from the maintenance work of the Turcot interchange (the "Turcot Project")

[9] On or around April 6, 2017, the Application was amended to include a third Applicant ("**Amended Application**"), Mr. Giovanni Paquin ("**Mr. Paquin**"), a natural person.

[10] On or around October 4, 2017, the Court heard requests by KPH and AGQ to adduce certain relevant documents as new Exhibits, for the purpose of the authorization hearing, which requests were consented to by the Applicants.

[11] On December 21, 2017, the Court authorized the said requests.

[12] Within the first hour of the authorization hearing, the Applicants presented an oral demand to replace the initial description of the class with the following description:

All persons, owners or tenants who, at any time since July 2012, resided within a circumference of 350 meters from the Turcot Project in the Cities of Montreal (including the South West Borough, Ville-Marie and Notre-Dame-de-Grâce), Montreal West and Westmount.

(The "**Modified Class**").

[13] Although the requested modification was significant, it was not contested, and the Court accepted to modify the description of the class.

⁶ Exhibit P-19.

[14] On the second day of the hearing, in response to the oral pleadings of the Defendants, the Applicants presented a second oral demand to modify the description of the class to replace “July 2012” by “Spring 2015”.

[15] Again, the Court accepted the oral request to amend.

[16] At the end of the hearing, the Applicants, again, modified the description of the class by substituting “Spring of 2015” with “March 21, 2015”.

[17] The AGQ opposed the amendment for its tardiness, and the prejudice suffered by it, as a result of the oscillating class definition over such a short time span. The matter was taken under advisement.

[18] Although, the Court empathizes with the challenges faced by the Defendant at a hearing on authorization when the class description is subject to several modifications, including a significant one, the effect of the latest proposed amendment is simply to substitute a season by a specific date.

[19] The Court will allow the amendment as it meets the criteria of Article 206 C.C.P.

[20] Thus, the final class description upon which the Application in authorization is to be decided is:

All persons, owners or tenants who, at any time since March 21st, 2015, resided within a circumference of 350 meters from the Turcot Project in the cities of Montreal (including the South-West Borough, Ville-Marie and Notre-Dame-de-Grâce), Montreal West and Westmount.

(The “Final Class Description”)

[21] The conclusions sought by the Applicants⁷ on behalf of the class, should the action be authorized, are as follows:

“GRANT the present application;

AUTHORIZE the bringing of a class action in the form of an Originating Application in declaratory judgment, injunctive relief and damages;

APPOINT the Applicants the status of representative plaintiffs of the persons included in the Class herein described as:

Class:

English:

⁷ Given the discontinuance against KPH, the Court has adjusted the conclusions and questions to refer to “Defendant” rather than “Defendants”, has deleted the conclusion and question relating to solidarity between Defendants and reference to “solidarity” in certain conclusions for the same reason, and has adjusted “Defendants” to the singular mode when required.

All persons, owners or tenants who, at any time since March 21st, 2015, resided within a circumference of 350 meters from the Turcot Project in the cities of Montreal (including the South-West Borough, Ville-Marie and Notre-Dame-de-Grâce), Montreal West and Westmount.

French :

Toutes les personnes, propriétaires ou locataires, qui, à un moment donné depuis 21 mars 2015, ont résidé dans un périmètre circonférentiel de trois cent cinquante (350) mètres du Projet Turcot, dans les villes de Montréal (incluant les arrondissements du Sud-Ouest, Ville-Marie et Notre-Dame-de-Grâce), Montréal-Ouest et Westmount.

(hereinafter referred to as the “Class”)

or any other Class to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Does Defendant infringe on Class members’ rights to peaceful enjoyment of their property (article 6) and their right to a healthy environment (article 46.1) as set out in Quebec’s *Charter of Human Rights and Freedoms*?
- b) Does Defendant contravene sections 19.1 and 20 of the *Environment Quality Act* (chapter Q-2)?
- c) Does Defendant contravene the noise standards set out in the *Environment Quality Act* (chapter Q-2), notably with respect to the *Note d’instruction* 98-01 under section 94 of said Act?
- d) Does Defendant contravene the municipal noise by-laws for the cities impacted by the Turcot Project?
- e) Has Defendant caused Class members abnormal and intolerable inconveniences, thereby failing in its obligation of good neighbourly conduct?
- f) Did Defendant err in the design, construction, installation, maintenance and operation of equipment with respect to the Turcot Project?
- g) Was Defendant negligent of the well-being of the Class members, their tranquility and their right to peaceful enjoyment of their property?
- h) Are Class members entitled to moral damages?

- i) Are Class members entitled to compensatory damages for trouble and inconvenience, Defendant's violation of their rights, and/or for the loss of value of their property?

[...]

- k) Are Class members entitled to obtain orders, both under the general rules and under section 19.3 of the *Environment Quality Act*, aimed at reducing the noise emitted by the Turcot Project, so that it is reduced to acceptable levels both qualitatively and quantitatively?
- l) Does Defendant violate article 976 of the *Civil Code of Quebec*?
- m) Does Defendant violate article 1457 of the *Civil Code of Quebec*?
- n) Is it necessary to issue an injunction against the Defendant?

IDENTIFY the conclusions sought by the Class action to be instituted as being the following:

GRANT Plaintiffs' action against Defendant on behalf of all the Class members;

DECLARE the Defendant liable for the damages suffered by the Applicants and each of the Class members;

ORDER the Defendant to take the necessary measures to reduce the noise generated by the Turcot Project, to acceptable levels, both qualitatively and quantitatively, based on the evidence that will be submitted to the Court;

CONDEMN the Defendant to pay the designated Plaintiffs and each of the class members an annual amount, to be determined, as of March 21, 2015, and until such time that sufficient noise mitigation measures have been implemented;

CONDEMN the Defendant to compensate the designated Plaintiffs and the Class members for the diminution in value to their property;

CONDEMN the Defendant to pay to each Class member a sum to be determined in compensation for any other damages which the Court may determine;

CONDEMN the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff*;

ORDER that the claims of individual Class members be the object of collective recovery if the proof permits and alternately, by individual recovery;

ORDER the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

CONDEMN the Defendant to bear the costs of the present action, including class counsel's professional fees and disbursements, the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

RENDER any other order that this Honourable Court shall determine;

DECLARE that all members of the Class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgment to be rendered herein;

ORDER the publication of a notice to the members of the Class in accordance with article 579 *C.C.P.* within sixty (60) days from the judgement to be rendered herein in the "News" sections of the Saturday editions of *LA PRESSE*, *LE JOURNAL DE MONTRÉAL*, and *THE MONTREAL GAZETTE*;

ORDER that said notice be published on the Defendant's various websites, Facebook pages and Twitter accounts, in a conspicuous place, with a link stating "Notice of a Class Action Concerning the Turcot Project – Avis d'une action collective concernant le projet échangeur Turcot";

ORDER the Defendant to send an Abbreviated Notice by regular mail and by e-mail to each Class member, to their last known physical and e-mail addresses, with the subject line "Notice of a Class Action – Avis d'une action collective";

RENDER any other order that this Honourable Court shall determine;

The whole with costs including publications fees."

2. PRELIMINARY COMMENTS

[22] Notwithstanding the substantial modification to the class description and the discontinuance against KPH, the allegations of the Application and conclusions sought have not been adjusted.

[23] The consequence is that important parts of the Application are either irrelevant in the context of the class description, or unclear as to their application.

[24] For example, the initial allegations pertaining to the composition of the class⁸ are in no way relevant as regards the Final Class Description.

[25] The use of Defendants in the plural sense is made throughout the proceeding, and it is unclear whether liability under 1457 C.C.Q. is also being sought against the AGQ, or whether it is simply an oversight and should have been removed upon the discontinuance against KPH.

[26] The last minute modifications to the class description, and the Applicants' failure to adjust their allegations accordingly, have the direct effect of rendering the Court's task at this stage of the proceedings more challenging. It must now assess and try to infer from the original allegations, what their relevant application is with respect to the Final Class Description.

3. THE CONTEXT

3.1 The Reconstruction of the Turcot Interchange

[27] The Turcot Interchange is an important hub, easily identifiable by its elevated structures, located on the Island of Montreal, South West of the Montreal downtown core which interconnects Highways 15, 20 and 720 ("**interconnecting highways**").

[28] It is an essential road link between Montreal's downtown area and the Champlain Bridge on its east side, and the Montreal-Pierre Elliott Trudeau International Airport on its west side.⁹

[29] The reconstruction of the Turcot Interchange began in 2009 and is currently expected to be completed in 2020.

[30] It is a massive undertaking which includes the demolition and reconstruction of other interchanges as well,¹⁰ and certain segments of the interconnecting highways, the relocation of parts of a transcontinental railway,¹¹ the demolition of old roads and the construction of new road links.¹²

⁸ Application, par. 37 to 43.

⁹ Exhibit P-1: Extract of the website of Transports, Mobilité durable et Électrification des transports Québec.

¹⁰ Exhibit P-2 : Angrignon, De la Vérendrye, Montreal West Interchanges.

¹¹ Exhibit P-2: the railway used by the Canadian National Railway.

¹² Exhibit P-2.

[31] The works extend over several kilometers, throughout the Cities of Montreal, Westmount and Montreal West,¹³ and involve multiple structures, some elevated some not, and various phases and schedules.¹⁴

3.2 The Applicants

[32] It is admitted that neither of the Applicants own property within 350 meters of the “Turcot Interchange” or the “Project”.¹⁵

[33] Mr. Berdah is the owner of the Applicant Galuchat.

[34] He does not, nor has he resided within 350 meters of the Turcot Interchange or the Project.¹⁶

[35] Since February 2015, Galuchat has occupied a rented premise,¹⁷ adjacent to the Project, in which it operates a furniture upholstery store.

[36] In the context of the Project, a sound barrier wall was erected parallel to Saint-Jacques Street, in Montreal, cutting off Galuchat’s premises from a useable public road and making it difficult to access the store.

[37] Since July 2012, Mr. Paquin has resided in an apartment near the Project,¹⁸ which he rents.

[38] Galuchat’s and Mr. Paquin’s premises are located in the same sector in the borough of Notre-Dame-de-Grâce (“NDG”), which sector is bordered by Saint-Jacques Street, Addington Street, Upper Lachine Road and Girouard Avenue.¹⁹

[39] Although not specifically alleged, but nonetheless inferable from the allegations and exhibits, the construction works, which caused the alleged neighbourly annoyances, appear to be the dismantling and construction of the Saint-Jacques overpass in the NDG borough, which overpass is located between Girouard Avenue and Decarie Boulevard, and services vehicles and pedestrians crossing over Highway 15²⁰ (“**Saint-Jacques overpass**”).

[40] The Saint-Jacques overpass work is included in the Project.

¹³ Exhibits P-2, PGQ-1 and PGQ-2.

¹⁴ Exhibits PGQ-1, PGQ-2, and R-3.

¹⁵ Admission noted in Judgment authorizing the production of Exhibits.

¹⁶ The Court uses the word “Project” to include all and any work related to the demolition and rebuilding of the Turcot Interchange.

¹⁷ 5457 Saint-Jacques Street, Montreal.

¹⁸ 919 Girouard Avenue, Montreal.

¹⁹ Exhibits R-2 and PGQ-4, PGQ-5.

²⁰ Exhibits R-1, R-3, R-6, P-11, P-12, P-13, P-14, PGQ-11 and PGQ 12.

4. **ANALYSIS**

[41] Articles 571, 574 and 575 of the *Code of Civil Procedure ("C.C.P.")* state:

571. A class action is a procedural means enabling a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class and to represent the class.

In addition to natural persons, legal persons established for a private interest, partnerships and associations or other groups not endowed with judicial personality may be members of the class.

A legal person established for a private interest, a partnership or an association or another group not endowed with juridical personality may, even without being a member of a class, ask to represent the class if the director, partner or member designated by that entity is a member of the class on behalf of which the entity is seeking to institute a class action, and the designee's interest is related to the purposes for which the entity was constituted.

574. Prior authorization of the court is required for a person to institute a class action.

The application for authorization must state the facts on which it is based and the nature of the class action, and describe the class on whose behalf the person intends to act. It must be served on the person against whom the person intends to institute the class action, with at least 30 days' notice of the presentation date.

An application for authorization may only be contested orally, and the court may allow relevant evidence to be submitted.

575. The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that

- (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
- (2) the facts alleged appear to justify the conclusions sought;
- (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
- (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

4.1 The role of the Authorizing Judge

[42] The Supreme Court of Canada and the Court of Appeal of Quebec have clearly stated and reminded us, in many decisions, that the applicant's burden at the

authorization stage is one of demonstration only.²¹ The threshold imposed on the applicant is low. The Judge must refrain from reviewing the merits of the matter, his/her role being limited to that “of a filter” to bar frivolous motions.²²

[43] The authorizing Judge must assume the facts alleged in the applicant’s proceeding to be true, and should read between the lines where the real meaning is clear, even if the allegations are not perfect,²³ and this, with the purposeful intent to achieve “the twin goals of deterrence and victim compensation” when possible.²⁴

[44] The role of the authorizing Judge is not to review the merits of the case, but only to ensure that the applicant has an arguable case, and that the legal syllogism being put forward is sustainable.²⁵

[45] The burden at this stage is one of logic and not of evidence, and while the authorizing Judge must consider the evidence put forward, he or she must resist the temptation to go through the evidence in a manner that should be left to the Judge on the merits, assuming the class action is authorized.²⁶

[46] For an authorization to be granted, the Court must be satisfied that the four conditions of Article 575 C.C.P. have been met.

[47] The Court will begin its analysis with the criteria set out at Articles 574 and 575(3) C.C.P..

4.2 Has the existence of a class been shown, and does the composition of the class make it difficult to apply the rule for mandates as provided at Article 575(3) C.C.P.?

[48] The existence of a class is a precondition to a class action.²⁷

[49] In the case *Western Canadian Shopping Centres Inc. v. Dutton*,²⁸ the Supreme Court of Canada has laid out the criteria to be applied when assessing the appropriateness of a class description:

38. While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear

²¹ *Infineon Technologies AG v. Option consommateurs*, 2013 R.C.S. 600; *Pharmascience inc. v. Option Consommateurs*, 2005 QCCA 437.

²² *Infineon Technologies AG v. Option consommateurs*, 2013 R.C.S. 600.

²³ *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, par. 32.

²⁴ *Infineon Technologies AG v. Option consommateurs*, 2013 3 R.C.S. 600, par. 60.

²⁵ *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, par. 32-36.

²⁶ *Id.*, par. 40 and following; and *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299.

²⁷ *Lambert (Gestion Peggy) c. Écolait ltée*, 2016 QCCA 659, par. 53.

²⁸ 2001 SCC 46, par. 38.

definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[Emphasis added – References omitted]

[50] In order to assess a putative class member's membership, the Court must ensure that "*the class is defined sufficiently narrowly [...]*".²⁹

20. [...] It falls to the putative representative to show that the class is defined sufficiently narrowly.

21. The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad—that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should disallow certification or allow certification on condition that the definition of the class be amended.

[Emphasis added – References omitted]

[51] The Quebec Court of Appeal, in the matter of *George v. Québec (Procureur général)*,³⁰ confirms these principles in the following manner :

[40] De ces arrêts se dégagent les enseignements applicables à la définition du groupe dans le cadre d'une demande d'autorisation pour exercer un recours collectif :

1. La définition du groupe doit être fondée sur des critères objectifs;
2. Les critères doivent s'appuyer sur un fondement rationnel;
3. La définition du groupe ne doit être ni circulaire ni imprécise;
4. La définition du groupe ne doit pas s'appuyer sur un ou des critères qui dépendent de l'issue du recours collectif au fond.

²⁹ *Hollick v. Toronto (City)*, 2001 SCC 68.

³⁰ 2006 QCCA 1204, par. 40; similarly *Lallier v. Volkswagen Canada Inc.*, 2007 QCCA 920; and *Del Guidice v. Honda Canada Inc.*, 2007 QCCA 922.

[52] It is the Applicant who must provide a class definition that is sufficiently clear and narrow so as to enable putative class members to know if they are included or not.³¹

[53] However, the Court can contribute to providing certain clarification and modifying certain elements in a class description, and it should do so where possible in order to achieve the objectives sought by class action proceedings.

4.3 Does a class exist?

4.3.1 The reference to the Turcot Project in the class definition

[54] The Final Class Description refers to the “Turcot Project” as the starting point of the geographical determination of the residents that are included as putative class members.

[55] The term “Turcot Project” is generally defined as follows in the Application:

7. This rebuilding, known as the “Turcot Project”, includes the reconstruction of the Angrignon, De La Vérendrye and the Montreal-West interchanges, as well as adjacent sections of highways 15, 20 and 720;

[Emphasis added]

[56] The expressions “Projet Turcot” or “Projet de reconstruction du complexe Turcot” are generally used by the Government in certain documents and refer, in a broad manner, to the work required in the context of rebuilding the Turcot Interchange and related structures.³²

[57] It is clear that the scope of the work included in the expression “Turcot Project” traverses three cities,³³ over many kilometers, but it lacks a precise definition, scope and perimeter.

[58] In fact, the scope of the work included in the expression “Turcot Project” evolves and varies over time as the “Turcot Project” progresses. The Exhibits filed by the Applicants³⁴ refer to structures being demolished, built or relocated, lanes kept opened and later abandoned and replaced with new lanes, highways being temporary closed, and reopened when appropriate.³⁵ The footprint of the Turcot Project is fluid and evolutive.

³¹ *Citizens for a Quality of Life v. Aéroports de Montréal*, 2007 QCCA 1274.

³² Exhibits P-1, P-2, P-3, PGQ-1 as examples.

³³ Cities of Montreal, Montreal West and Westmount.

³⁴ Exhibits P-1 and P-2.

³⁵ Exhibits P-2 and P-3.

[59] In the documents filed by the AGQ or KPH, they refer to the scope of the work in more or less detail, and at specific dates. For example:

- List of contracts of the Turcot Project as of July 31, 2017;³⁶
- Projet Turcot état d'avancement des travaux-volet 1 mode traditionnel as of July 3, 2017;³⁷
- Zones des travaux des lots préparatoires du secteur centre pour les années 2014 à 2016.³⁸

[60] The reference to the Turcot Project in the Final Class Description is not specific enough and does not allow for the identification of the members, given the lack of an identifiable geographical perimeter, scope of work, and the evolutive footprint of what is referred to as the "Turcot Project".

[61] As such, the Court finds the reference to Turcot Project in the class definition not to be sufficiently precise.

4.3.2 Is the class sufficiently narrow?

[62] As mentioned above, the Project is massive.³⁹

[63] The Applicants are located within a single block in the City of Montreal, borough of NDG, bordered by Saint-Jacques Street, Addington Street, Upper-Lachine Road and Girouard Avenue.⁴⁰

[64] One of the consequences of the failure to align the allegations of the Application to the Final Class Description is that those pertaining to the composition of the class refer to the number of vehicles that use the Turcot Interchange,⁴¹ and the tens of thousands of people who are members of the class, but not to the relevant items of the Final Class Description such as the residents within the 350 meters of the Project, or part thereof.

[65] In fact, in an effort to identify other class members, the Applicants relied on inferences.⁴²

³⁶ PGQ-1.

³⁷ PGQ-2.

³⁸ Exhibit R-1.

³⁹ Exhibit PGQ-1.

⁴⁰ Exhibit R-2.

⁴¹ Re-Amended Application, par. 37 to 43.

⁴² Re-Amended Application, par. 50.

[66] The issues raised by the Applicants relate to the annoyances suffered by residents as a result of the Project due to excessive noise, dust, and other inconveniences.

[67] The inconveniences suffered by the Applicants result from the Saint-Jacques overpass work, which is in proximity to the areas where Mr. Paquin resides and Galuchat's business operates. It is a small part of the overall Project, and is limited in scope.

[68] Although the residents who live in proximity to the Saint-Jacques overpass may qualify as a class, there are no allegations or evidence to support that the class should include more than those residents.

[69] The class description is unnecessarily broad and it should be narrowed to include only residents living in proximity to the Saint-Jacques overpass work.

4.3.3 Is 350 meters a justifiable distance?

[70] There are no allegations in the Application, or in any other document, showing the basis and rationale behind the choice of opting for a distance of 350 meters from the Turcot Project, within which the persons of the proposed class must reside.

[71] Furthermore, the reference to a "circumference" is confusing and of little use. Nothing alleged or even argued fixes a center point from which a circumference can be drawn.

[72] The AGQ argued that Applicants' counsel simply copied the class description used in *Krantz v. Quebec (Procureur general)*'s⁴³ decision without any adjustment. This may be true, but at least in the Krantz' decision, the starting point of the perimeter was clear and objective, and not vague and fluid as in this case.

[73] That being said, given the low threshold that Applicants must meet at the authorization stage, and the objective of class proceedings, the Court will accept the 350 meters as the distance from the St-Jacques overpass work within which the putative class members must reside.

4.3.4 Should the Court redefine the class?

[74] Given the general and not always relevant allegations of the Application, it is challenging to proceed with the redefinition of the Final Class Description. The Court has nonetheless made the effort to redefine the class as it considers that the class action should be authorized and it would be contrary to the objectives sought by class action proceedings not to do so in the present case.

⁴³ 2006 QCCS 2143.

[75] For the reasons set forth above, the Court will redefine the description of the class as follows:

All residents, who at any time since March 21, 2015, resided within 350 meters of that section of Saint-Jacques Street, (including the Saint-Jacques overpass), which runs West to East, intersecting the West perimeter of Girouard Avenue in the City of Montreal, Borough of Notre-Dame-de-Grâce, and the East perimeter of Decarie Boulevard in the same Borough.

[“Court Redefined Class”]

4.4 Whether the facts alleged appear to justify the conclusions sought - Article 575(2) C.C.P.

4.4.1 Applicants’ Cause of Action

➤ **Applicant Mr. Berdah**

[76] Mr. Berdah is a natural person who does not reside in proximity to the Project.⁴⁴

[77] Notwithstanding the sound barrier, Mr. Berdah claims he suffers from the noise caused by the Turcot Project when he attends Galuchat’s premises.

[78] He also asserts that because of the Turcot Project, he must park several blocks from his work at Galuchat, and must go through a virtual maze to get to it.⁴⁵

[79] He does not qualify as a potential member under the class nor is he a neighbour, as he is not a resident within 350 meters of the Saint-Jacques overpass work.

[80] The Court wonders if it is by oversight that he remains a named Applicant, simply due to the failure to adjust the allegations of the Application upon the significant modification to the class description.

➤ **Applicant Galuchat**

[81] Since January 2015, Galuchat operates a furniture upholstery store in premises it leases “in the heart of the Turcot Project reconstruction”.⁴⁶

[82] With the objective of reducing the negative impact of the Turcot Project on neighbouring properties, a noise barrier wall was erected near Galuchat’s business, along Saint-Jacques Street, which essentially enclosed and isolated Galuchat’s

⁴⁴ Re-Amended Application, par. 14 to 28.

⁴⁵ Exhibits P-7, P-8, P-9, P-10, P-15, and P-16: Global report.

⁴⁶ Re-Amended Application, par. 13.

premises, making access thereto challenging,⁴⁷ and vehicular access nearly impossible.⁴⁸

[83] Galuchat, who is a “neighbour”, claims that the difficult access to its premises has caused its revenues and business value to drop significantly,⁴⁹ obliging it to lay off employees.⁵⁰

[84] Also, since the erection of the sound barrier wall, the City of Montreal no longer picks up garbage around Galuchat’s premises nor does it clear the snow.

[85] There are no allegations that any other businesses or residents suffer from such issues.

[86] In fact, Galuchat’s issues seem to be specific to Galuchat, and while it may possibly have an individual claim against the Defendant or others, which the Court is not to determine at this stage, its case does not justify the conclusions sought as they are not common to those of the class.

➤ **Applicant Mr. Paquin**

[87] As for Mr. Paquin, the cause of action is based on the fact that he is a tenant living in the surrounding area of the Project site, and more particularly the Saint-Jacques overpass work area, and is suffering from abnormal neighbourhood disturbances due to the construction work taking place.

[88] He alleges that he must endure constant banging and loud noises, bright lights emanating from the work, and the circulation of trucks at all hours of the day and night, all of which cause him to be deprived of sleep and make his furniture shake.⁵¹

[89] He also alleges a water and electricity shortage due to the work.⁵²

28.5 On Friday, February 10th, 2017, Paquin and his neighbours suffered a complete loss of water (as a result of a water main burst) beginning around 6:00 a.m., which lasted until Sunday, February 12th, 2017;

28.6 The electricity and water in Paquin’s apartment constantly shuts off for several hours and days at a time;

⁴⁷ Exhibits P-8 and P-9.

⁴⁸ Exhibit P-8.

⁴⁹ Re-Amended Application, par. 20 and 21.

⁵⁰ Re-Amended Application, par. 22.

⁵¹ Re-Amended Application and Exhibit P-12.

⁵² Re-Amended Application, par. 28.5 to 28.9.

28.7 Paquin is often unable to cook due to the fact that he is without water and electricity, and is thus forced to incur costs of paying for outside, less healthy food;

28.8 On February 10, 2017, Paquin sent an email to his borough explaining some of the above;

28.9 Within 7 minutes of Paquin's email, Peter McQueen, City Councillor for the Notre-Dame-de-Grâce district, immediately responded by recognizing and admitting the following [...] :

*Thank you for notifying us about this and I am forwarding your message to the highest levels of our borough management for their solution if (sic) this problem asap please. I agree that you residents of that corner have suffered enough disruption from Transport Québec work there....*⁵³

[90] The municipal councillor's comments regarding the AGQ as cited cannot constitute an admission by the latter.

[91] The Court will review the various claims in order to assess the cause of action. One arguable cause would be sufficient to satisfy the applicable requirements.

4.4.2 Abnormal Neighbourhood Disturbances

[92] Article 976 C.C.Q. provides for the duties that neighbours owe each other:

976. Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local usage.

[93] In the leading case, *St. Lawrence Cement*,⁵⁴ the Supreme Court determined that article 976 C.C.Q. gives rise to a no-fault liability regime and concluded as follows:

[86] Even though it appears to be absolute, the right of ownership has limits. Article 976 C.C.Q. establishes one such limit in prohibiting owners of land from forcing their neighbours to suffer abnormal or excessive annoyances. This limit relates to the *result* of the owner's act rather than to the owner's *conduct*. It can therefore be said that in Quebec civil law, there is, in respect of neighborhood disturbances, a no-fault liability regime based on art. 976 C.C.Q., which does not require recourse to the concept of abuse of rights or to the general rules of civil liability. With this form of liability, a fair balance is struck between the rights of owners or occupants of neighbouring lands.

⁵³ Exhibits P-13 and P-14.

⁵⁴ *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, par. 86.

[94] The Supreme Court also confirmed that a liberal interpretation must be given to the legislature's choice of the word "neighbour" as opposed to "owner" in article 976 C.C.Q.⁵⁵ It is generally recognized that the term "neighbour" includes all holders of real rights, as well as those who exercise a right of enjoyment in the property. As author Pierre-Claude Lafond explains⁵⁶:

Certains ont sursauté face à la décision de la Cour d'admettre les locataires au rang des voisins pouvant se réclamer de l'article 976 C.c.Q., une disposition s'insérant dans un chapitre sur les règles particulières à la *propriété* immobilière. Pourtant, il était admis majoritairement en jurisprudence et en doctrine que les titulaires d'autres droits réels que le droit de propriété, de même que toute personne exerçant un droit de jouissance de l'immeuble peuvent se plaindre de troubles de voisinage.

[References omitted]

[95] The excessive nature of the annoyance must be determined objectively, taking into consideration the geographic location and nature of the property.

[96] In the Court's view, Mr. Berdah is not a neighbour, his company is. He personally has no cause of action under this cause.

4.4.3 The excessive noise

[97] Although there is no allegation that the AGQ is the owner of the structures involved in the Turcot Project⁵⁷, thus a potential neighbour, the Court infers, at this stage of the proceedings, that the allegations of the Application and the Exhibits filed⁵⁸ show, *prima facie*, that the AGQ is the owner of important structures, including the Saint-Jacques overpass, and is a neighbour to Galuchat and Mr. Paquin.

[98] Under the provisions of the no-fault liability regime, it is not necessary to allege a fault on the part of the AGQ, but only to demonstrate that a neighbour, or a class of neighbours, suffered abnormal neighbourhood annoyances according to the nature or location of its land or local usage.

[99] The facts and exhibits, when held as truthful, demonstrate that there are inconveniences such as loud noises during the day and at night in proximity to Mr. Paquin's premises, involving banging sounds, or the noise of trucks circulating, and that it is disturbing.

⁵⁵ *Id.*, par. 96.

⁵⁶ Pierre-Claude LAFOND, «*L'heureuse alliance des troubles de voisinage et du recours collectif: portée et effets de l'arrêt Ciment du Saint-Laurent*», (2009) 68 R du B. 385, p. 397-398.

⁵⁷ *Act Respecting Roads*, RLRQ c. V-9.

⁵⁸ Exhibits P-2, P-3, P-4, PG-1, PG-2, PG 8, PG-9, and Sections 6 and 7 of the *Act Respecting Roads*, préc. Note 60.

[100] The Court concludes, from the allegations and the exhibits filed, that Mr. Paquin has made an arguable case and has met the relatively low standard to demonstrate that he has suffered abnormal neighbourhood annoyances as a result of the noise caused by the Saint-Jacques overpass work.

[101] The residential nature of Mr. Paquin's premises, which are in proximity to the Saint-Jacques overpass work, renders the described noises and other inconveniences, *prima facie*, an abnormal neighbourhood disturbance.

[102] As to Galuchat, its cause of action is not based on the excessive noise or other inconvenience caused by the work on the Saint-Jacques overpass, but rather on the presence of the sound barrier wall and its effect on its furniture upholstery business.

4.4.4 Loss of business value and revenues, obligation to lay off employees and other inconveniences due to the sound barrier wall

[103] The allegations in the Application and the Exhibits, and more particularly, a news report by TVA named "*Un commerçant pris en otage*", demonstrates the isolation of Galuchat's premises as a result of the sound barrier wall.

[104] To access the store, pedestrians must go through a virtual maze, and for vehicles, it is near to impossible.

[105] The consequences suffered by Galuchat itself as a result of the sound barrier wall appear to be unique to Galuchat, and as mentioned above there is no allegation of any other commerce suffering the same alleged inconvenience.

[106] Galuchat's case does not justify the conclusion sought in the class action.

4.4.5 Excessive dust or foul odor

[107] In the allegations setting out each Applicant's cause of action, there are no specific allegations describing episodes during which the Applicants would have had to endure dust or foul odor as a result of the Saint-Jacques overpass work.

[108] While it is true that the allegations referring to dust and foul odor are general in nature, the Court is of the view that when taken with the other allegations and Exhibits, an inference may be made that Mr. Paquin arguably suffers from neighbourly inconveniences due to dust and foul odor, and the Applicants meet the very low threshold they have at this stage of the proceedings.

[109] The Court is satisfied that the Applicants have demonstrated a *prima facie* case, that they have suffered abnormal neighbourhood disturbances due to excessive dust or foul odor.

4.4.6 Limited access to water and Electricity

[110] Applicant Mr. Paquin alleges the following:

[...]

28.5 On Friday, February 10th, 2017, Paquin and “his neighbours” suffered a complete loss of water (as a result of a water main burst) beginning around 6:00 a.m., which lasted until Sunday, February 12th, 2017;

28.6 The electricity and water in Paquin’s apartment constantly shuts off for several hours and days at a time;

28.7 Paquin is often unable to cook due to the fact that he is without water and electricity, and is thus forced to incur costs of paying for outside, less healthy food;

28.8 On February 10th, 2017, Paquin sent an email to his borough explaining some of the above;

[111] Although there are no specific allegations indicating that the water and electrical issues Mr. Paquin and his neighbours have already experienced are due to the work on the Saint-Jacques overpass, given the low threshold, the Court infers that this is what was intended by the Application, and is satisfied that the Applicants have demonstrated a *prima facie* case, that they may have suffered abnormal neighbouring disturbance due to their limited access to water and electricity at a given time.

4.5 Liability under Article 1457 CCQ

[112] It is not clear to the Court whether the Applicants are seeking liability of the AGQ under article 1457 CCQ, or if that cause of action was reserved exclusively for KPH.

[113] For a cause of action to be tenable under article 1457 C.C.Q., Applicants must allege a fault, damages and a causal link.

[114] In the Application, the only allegation pertaining to a fault reads as follows:

33. All of the damages to the Class members are a direct and proximate result of the Defendants’ misconduct and willful blindness with respect to its obligations;

[115] The AGQ argues that there are no allegations describing in what way the AGQ misbehaved or was willfully blind, other than in relation to the neighbourhood annoyances.

[116] It is also true that the Exhibits reveal that the AGQ obtained the required Certificates of Authorization under Article 22 of the *Environment Quality Act*,⁵⁹ and consulted concerned persons and kept them informed regarding the relevant information or measures being taken in the context of the Turcot Project.⁶⁰

[117] That being said, given the low threshold the Applicants have at this stage of the proceedings, and the Court's intention to authorize the class action, the Court considers it preferable, at this stage, to refer the question to the merits for the Judge to decide.

4.6 Claim for damages as a result of the deprivation of the Applicants' Charter's right to the peaceful enjoyment of their property and to live in a healthy environment

[118] Articles 6, 46.1 and 49 of the Quebec *Charter of Human Rights and Freedoms*⁶¹ read as follows:

6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

46.1. Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law.

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[119] In its decision *Aubry v. Éditions Vice-Versa*,⁶² the Supreme Court of Canada has confirmed that the infringement of a right guaranteed by the *Charter of Human Rights and Freedoms*⁶³ will give rise to an action in damages only if a fault, damage and causal connection are established. The relevant passage reads as follows:

49. The case at bar raises a problem of civil law and it is in light of that law that it must be resolved. The infringement of a right guaranteed by the (*Charter of Human Rights and Freedoms*) (hereinafter the "Quebec Charter") gives rise, under s. 49 para.1, to an action for moral and material prejudice. Such an action is subject to the civil law principles of recovery. As a result, the traditional elements of liability, namely fault, damage and causal connection, must be established.

⁵⁹ CQLR c. Q-2; Exhibits PGQ-8 and PGQ-9.

⁶⁰ Exhibits PGQ-10, PGQ-11.

⁶¹ CQLR, c. C-12.

⁶² [1998] 1 SCR 591.

⁶³ CQLR, c. C-12.

[References omitted]

[120] As stated above, given the general allegations, the low threshold the Applicants must meet at this stage of the proceedings, and that the class action will be authorized, the Court considers it preferable to refer this issue to the Judge on the merits.

4.7 Injunction relief in order to oblige the AGQ to reduce the noise level to acceptable levels

[121] Class counsel rightly asserts that injunctive relief conclusions have been authorized in the context of a class action.⁶⁴

[122] To meet their burden of demonstration, allegations demonstrating, at least some colour of a right to injunctive relief must be found in the Application or Exhibits.

[123] The injunctive order sought in the proposed conclusions reads as follows:

ORDER the Defendants to take the necessary measures to reduce the noise generated by the Turcot Project, to acceptable levels, both qualitatively and quantitatively, based on the evidence that will be submitted to the Court.

[124] Applicants rely on the general rules pertaining to injunctions and the *Environment Quality Act* (the “**Act**”)⁶⁵ to support their conclusion. The questions set forth in the Application, which relate to same, read as follows:

b) Do Defendants contravene sections 19.1 and 20 of the *Environment Quality Act* (chapter Q-2)?;

c) Do Defendants contravene the noise standards set out in the *Environment Quality Act* (chapter Q-2), notably with respect to the Note d'instruction 98-01 under section 94 of said Act? and

k) Are Class members entitled to obtain orders, both under the general rules and under section 19.3 of the *Environment Quality Act*, aimed at reducing the noise emitted by the Turcot Project, so that it is reduced to acceptable levels both qualitatively and quantitatively?

[125] The *Act*⁶⁶ specifically recognizes the right of a natural person to seek injunctive relief if a right provided thereunder was interfered with, and certain circumstances are met.

⁶⁴ *Abicidan c. Bell Canada*, 2017 QCCS 1198, par. 63; *Kennedy c. Colacem Canada inc.*, 2015 QCCS 222, par. 154.

⁶⁵ CQLR, c. Q-2.

⁶⁶ CQLR, c. Q-2, Sections 19.2 and 19.3.

[126] The AGQ argues that this right to an injunction is impossible if the Project was authorized as required by the Act,⁶⁷ except for acts contrary to the authorization document.

[127] Even if true, this is a mixed issue of fact and law to be decided on the merits, and the Court finds that the Applicants, given the low threshold, have met their burden of demonstration insofar as this issue is concerned.⁶⁸

4.8 Compensatory damages

[128] Given the above, a *prima facie* cause of action has been demonstrated to justify compensatory damages as a result of the allegations of abnormal neighbourhood disturbances relating to the Saint-Jacques overpass work.

[129] As the situation is still ongoing, the damages alleged need not be quantified at this stage.⁶⁹

4.9 Do the claims of the members of the class raise identical, similar or related issues of law or fact – Article 575(1) C.C.P.

[130] The Court Redefined Class description reads as follows:

All residents, who at any time since March 21, 2015, resided within 350 meters of that section of Saint-Jacques Street, (including the Saint-Jacques overpass), which runs West to East, intersecting the West perimeter of Girouard Avenue in the City of Montreal, Borough of Notre-Dame-de-Grâce, and the East perimeter of Decarie Boulevard in the same Borough.

[131] In *Vivendi Canada Inc. c. Dell'Aniello*⁷⁰ the Supreme Court of Canada sets out the analysis that the authorizing Judge must do to determine whether the criteria of Article 575(1) C.C.P. have been met. :

[41] Dans l'arrêt *Dutton*, notre Cour a formulé certains principes pertinents pour décider si un recours collectif soulève une ou plusieurs questions communes aux réclamations de l'ensemble des membres du groupe. La juge en chef McLachlin s'est exprimée ainsi au nom de la Cour :

Les critères de communauté ont toujours été une source de confusion pour les tribunaux. Il faut aborder le sujet de la communauté en fonction de l'objet. La question sous-jacente est de savoir si le fait d'autoriser le recours collectif permettra d'éviter la répétition de l'appréciation des faits ou de l'analyse

⁶⁷ *Id.*, on the basis of Section 19.7 of the Act; Exhibit PGQ-8.

⁶⁸ Exhibit PGQ-8: Certificate of Authorizations.

⁶⁹ *Abicidan c. Bell Canada*, 2017 QCCS 1198, par. 60 and 69.

⁷⁰ [2014] 1 R.C.S. 3, par. 41, 42 and 58.

juridique. Une question ne sera donc « commune » que lorsque sa résolution est nécessaire pour le règlement des demandes de chaque membre du groupe. Il n'est pas essentiel que les membres du groupe soient dans une situation identique par rapport à la partie adverse. Il n'est pas nécessaire non plus que les questions communes prédominent sur les questions non communes ni que leur résolution règle les demandes de chaque membre du groupe. Les demandes des membres du groupe doivent toutefois partager un élément commun important afin de justifier le recours collectif. Pour décider si des questions communes motivent un recours collectif, le tribunal peut avoir à évaluer l'importance des questions communes par rapport aux questions individuelles. Dans ce cas, le tribunal doit se rappeler qu'il n'est pas toujours possible pour le représentant de plaider les demandes de chaque membre du groupe avec un degré de spécificité équivalant à ce qui est exigé dans une poursuite individuelle.

[42] Bien que l'affaire *Dutton* repose sur le droit procédural de l'Alberta, les principes énoncés par notre Cour sur le critère de la communauté de questions ont été invoqués par la Cour d'appel du Québec à maintes reprises. [...]

[...]

[58] [...] le requérant doit démontrer qu'un aspect important du litige se prête à une décision collective et qu'une fois cet aspect décidé, les parties auront réglé une part non négligeable du litige. [...] Ainsi, la seule présence d'une question de droit ou de fait identique, connexe ou similaire suffit pour satisfaire au critère de l'article 1003 a) C.p.c. sauf si cette question ne joue qu'un rôle négligeable quant au sort du recours.»

[Emphasis added]

[132] The Applicants submit that the members of the proposed group share an interest in the following common questions⁷¹:

- a) Does Defendant infringe on Class members' rights to peaceful enjoyment of their property (article 6) and their right to a healthy environment (article 46.1) as set out in Quebec's *Charter of Human Rights and Freedoms*?
- b) Does Defendant contravene sections 19.1 and 20 of the *Environment Quality Act* (chapter Q-2)?
- c) Does Defendant contravene the noise standards set out in the *Environment Quality Act* (chapter Q-2), notably with respect to the Note d'instruction 98-01 under section 94 of said Act?

⁷¹ The Court has adjusted the questions to refer to "Defendant" rather than "Defendants", given the discontinuance against KPH, has deleted the one relating to solidarity between Defendants and other references to "solidarity" for the same reason, and has adjusted certain questions to the singular mode when required.

- d) Does Defendant contravene the municipal noise by-laws for the cities impacted by the Saint-Jacques overpass work?
 - e) Has Defendant caused Class members abnormal and intolerable inconveniences, thereby failing in their obligation of good neighbourly conduct?
 - f) Did Defendant err in the design, construction, installation, maintenance and operations of equipment with respect to the Turcot Project?
 - g) Was Defendant negligent of the well-being of the Class members, their tranquility and their right to peaceful enjoyment of their property?
 - h) Are Class members entitled to moral damages?
 - i) Are Class members entitled to compensatory damages for trouble and inconvenience, Defendant's violation of their rights, and/or for the loss of value of their property?
- [...]
- k) Are Class members entitled to obtain orders, both under the general rules and under section 19.3 of the *Environment Quality Act*, aimed at reducing the noise emitted by the Turcot Project, so that it is reduced to acceptable levels both qualitatively and quantitatively?
 - l) Does Defendant violate article 976 of the Civil Code of Quebec?
 - m) Does Defendant violate article 1457 of the Civil Code of Quebec?
 - n) Is it necessary to issue an injunction against the Defendant?

[133] Although the class members need not all to be in the same situation vis-à-vis the AGQ, or that a common issue predominates over the non-common issues, one common question is required, which must relate to an important part of the issue and its answer must resolve the situation for the class members in a significant manner.

[134] Based on the allegations of the Applications, the Court concludes that there are sufficient common questions to meet the conditions of Article 575(1) *C.C.P.*

[135] That being said, there are no relevant allegations relating to the loss of value of property or that the AGQ erred in the “design, construction, installation, maintenance and operation of equipment with respect to the Turcot Project”. Thus the Court finds that questions “f” and part of question “i” are not common questions.

4.10 Whether the representative Applicants are adequate (Article 575(4) C.C.P.)

[136] In the *Infineon*⁷² case, the Supreme Court of Canada confirmed that an adequate representation requires the consideration of three factors: interest in the suit, competence and absence of conflict with the group members. These factors must be interpreted liberally as no proposed representative should be excluded, unless his or her interest or competence is such that the case could not possibly proceed fairly.

➤ Mr. Berdah

[137] Mr. Berdah personally has no legal interest in the case, as he does not reside within the set perimeter of the St-Jacques Street nor of the Turcot Project, and is not a putative class member.

➤ Galuchat

[138] Galuchat is in a unique situation. It is completely isolated as a result of the erection of a sound barrier wall.

[139] There is no allegation that Galuchat's situation is shared by other businesses or even a group.

[140] In fact, Mr. Berdah's interview on TVA,⁷³ and an e-mail he wrote to "Turcot-commentaires" confirms that Galuchat's situation is in fact unique, and it is the only business with two complete windows that face the Turcot Project and the sound barrier.⁷⁴

[141] During oral arguments, Applicants' counsel pointed out that the name of another business, Mazda Gabriel, appears on a road sign at the entrance of the virtual maze pedestrians must go through to get to Galuchat's.

[142] Nothing demonstrates where Mazda Gabriel is located or whether it is in the same situation as Galuchat.

➤ Mr. Paquin

[143] Mr. Paquin meets the required conditions to act as a representative to the putative class.

⁷² *Infineon Technologies AG c. Option consommateurs*, [2013] 3 R.C.S. 600

⁷³ Exhibit P-16.

⁷⁴ Exhibit P-10.

WHEREFORE, THE COURT:

[144] **GRANTS** the Re-Application to authorize the bringing of a class action and to appoint the status of representative;

[145] **APPOINTS** Giovanni Paquin as representative of the persons included in the class described as:

All residents, who at any time since March 21, 2015, resided within 350 meters of that section of the Saint-Jacques Street, (including the Saint-Jacques overpass), which runs West to East, intersecting the West perimeter of Girouard Avenue in the City of Montreal, Borough of Notre-Dame-de-Grâce, and the East perimeter of Decarie Boulevard in the same Borough.

[146] **IDENTIFIES** the issues to be dealt with collectively as follows:

- a) Did Defendant infringe on Class members' rights to peaceful enjoyment of their property (article 6) and their right to a healthy environment (article 46.1) as set out in Quebec's *Charter of Human Rights and Freedoms*?
- b) Did Defendant contravene sections 19.1 and 20 of the *Environment Quality Act* (chapter Q-2)?
- c) Did Defendant contravene the noise standards set out in the *Environment Quality Act* (chapter Q-2), notably with respect to the Note d'instruction 98-01 under section 94 of said Act?
- d) Did Defendant contravene the municipal noise by-laws for the cities impacted by the Saint-Jacques overpass work?
- e) Has Defendant caused Class members abnormal and intolerable inconveniences, thereby failing in their obligation of good neighbourly conduct?
- f) (...)
- g) Was Defendant negligent of the well-being of the Class members, their tranquility and their right to peaceful enjoyment of their property?
- h) Are Class members entitled to moral damages?
- i) Are Class members entitled to compensatory damages for trouble and inconvenience and or Defendant's violation of their rights?
- j) (...)

- k) Are Class members entitled to obtain orders, both under the general rules and under section 19.3 of the Environment Quality Act, aimed at reducing the noise emitted in the context of the Work on the St-Jacques Overpass, so that it is reduced to acceptable levels both qualitatively and quantitatively?
- l) Does Defendant violate article 976 of the Civil Code of Quebec?
- m) Does Defendant violate article 1457 of the Civil Code of Quebec?
- n) Is it necessary to issue an injunction against the Defendant?

[147] **AUTHORIZES** the class action Application to seek the following conclusion:

[148] **IDENTIFIES** the conclusions sought by the class action to be instituted as being the following:

- 148.1. **GRANTS** Applicant's action against Defendant on behalf of all the Class members;
- 148.2. **DECLARES** the Defendant liable for the damages suffered by the Applicant and each of the class members;
- 148.3. **ORDERS** the Defendant to take the necessary measures to reduce the noise generated by the Saint-Jacques overpass work, to acceptable levels, both qualitatively and quantitatively, based on the evidence that will be submitted to the Court;
- 148.4. **CONDEMNS** the Defendant to pay the designated Applicant and each of the class members an annual amount, to be determined, as of March 21, 2015, and until such time that sufficient noise mitigation measures have been implemented;
- 148.5. **CONDEMNS** the Defendant to pay to each class member a sum to be determined in compensation for any other damages which the Court may determine;
- 148.6. **CONDEMNS** the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff*;
- 148.7. **ORDERS** that the claims of individual class members be the object of collective recovery if the proof permits and alternately, by individual recovery;
- 148.8. **ORDERS** the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

148.9. **CONDEMNNS** the Defendant to bear the costs of the present action, including class counsel's professional fees and disbursements, the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

[149] **DECLARES** that all members of the class that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;

[150] **ORDERS** the publication of a notice to the members of the Class in accordance with article 579 C.C.P., pursuant to a further order of the Court approving the content of the notice and **ORDERS** Defendant to pay for said publication costs;

[151] **DIRECTS** counsel of the parties to submit to the Court the proposed notice and distribution plan no later than 45 days from the present judgment, or at any other date that may be authorized by the Court, as the case may be, upon request of counsel;

[152] **FIXES** the delay for a class member to opt out of the class at sixty (60) days from the date of the publication of the notice to the members and **DECLARES** that all members of the class who have not requested their exclusion from the class in the prescribed delay will be bound by any judgment to be rendered on the class action to be instituted;

[153] **WITH LEGAL FEES** against Defendant, including the costs related to the publication of the notices to class members.

KAREN M. ROGERS, J.S.C.

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Hearing dates: January 22-23, 2018
Argumentation by AGQ: February 23, 2018
Comments by Applicants: February 28, 2018
Taken under advisement: February 28, 2018

St. Lawrence Cement Inc. v. Barrette

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Bastarache*, LeBel, Deschamps, Fish, Abella and Charron JJ.

Heard: March 27, 2008;

Judgment: November 20, 2008.

File No.: 31782.

[2008] 3 S.C.R. 392 | [2008] 3 R.C.S. 392 | [2008] S.C.J. No. 65 | [2008] A.C.S. no 65 | 2008 SCC 64

St. Lawrence Cement Inc., Appellant/Respondent on cross-appeal; v. Huguette Barrette and Claude Cochrane, in their capacity as representatives of the designated group, Respondents/Appellants on cross-appeal, and Friends of the Earth, Quebec Environmental Law Centre and Quebec Business Council on the Environment, Interveners.

(119 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Case Summary

Subsequent History:

* Bastarache J. took no part in the judgment.

Catchwords:

Property — Neighbourhood disturbances — No-fault liability — Operation of cement plant — Whether in Quebec civil law scheme of no-fault civil liability in respect of neighbourhood disturbances under art. 976 C.C.Q. applies where annoyances suffered are excessive — Whether special statute governing plant's activities confers immunity on plant for neighbourhood disturbances.

Catchwords:

Prescription — Interruption — Judicial demand — Neighbourhood disturbances resulting from operation of cement plant causing damage that spread out over time — Whether lawsuit interrupted prescription for damage suffered after lawsuit filed — Whether that damage arose from "same source" — Civil Code of Québec, S.Q. 1991, c. 64, art. 2896.

Damages — Assessment — Use of average amounts — Class action — Neighbourhood disturbances resulting from operation of cement plant — Members of group divided into four residential zones to ensure that there some basic injury common to residents of each zone — Recovery subject to individual claims procedure, but amount to be awarded to each member assessed using average determined for each zone — Whether it appropriate to use average amounts in assessing damages of members of group covered by class action.

Summary:

A special statute passed by the Quebec legislature in 1952 authorized SLC to build a cement plant in a municipality. After the plant began operating in 1955, neighbourhood problems arose between SLC and neighbours who were displeased with the consequences of the plant's activities. The Ministère de l'Environnement stepped in several times in response to citizens' complaints about problems with dust, odours and noise, and the plant itself produced several environmental incident reports. Alleging various faults in the operation of SLC's plant and also contending that the neighbourhood disturbances caused by the plant were abnormal or excessive, B and C filed a motion for authorization to institute a class action on behalf of the other residents living in areas near the plant. The motion was granted, and the action was filed on August 1, 1994. SLC stopped operating the plant in 1997.

The trial court allowed the class action on the basis that a scheme of no-fault liability in respect of neighbourhood disturbances exists under art. 976 of the *Civil Code of Québec* ("C.C.Q."). Because, in its view, the evidence showed that there was a common injury, but that it varied in intensity from one zone to another and from year to year, the court awarded damages that varied from zone to zone. It also held that group members would have to file individual claims for the damages being awarded, since it was difficult to determine the exact number of members in each zone. The Court of Appeal allowed SLC's appeal in part with regard to certain aspects of the assessment of damages, but found the company civilly liable on the basis of proven fault under the general rules of civil liability in light of its failure to comply with certain applicable regulatory provisions. The court rejected the theory of no-fault liability in respect of neighbourhood disturbances.

SLC appealed with regard to the Court of Appeal's conclusion that it was liable on the basis of fault, and to the method adopted for determining the quantum of damages, to prescription and to the immunity to which it claims to be entitled under the special statute applicable to its plant. B and C cross-appealed, seeking recognition of a no-fault liability scheme applicable to neighbourhood annoyances that are excessive, and seeking to restore the trial court's conclusions on the quantum of damages.

Held: The appeal should be dismissed and the cross-appeal allowed.

Even though it appears to be absolute, the right of ownership has limits. Article 976 C.C.Q. exemplifies this in prohibiting owners of land from forcing their neighbours to suffer abnormal or excessive annoyances. Two regimes of civil liability in respect of neighbourhood disturbances should be recognized

in Quebec law: one, under the ordinary rules of civil liability, is based on the wrongful conduct of the person who allegedly caused the disturbances, while the second is a regime of no-fault liability based on the extent of the annoyances suffered by the victim for the purposes of art. 976 C.C.Q. [para. 20] [para. 86]

Where fault-based liability is concerned, civil fault may relate either to the abusive exercise of a right of ownership (art. 7 C.C.Q.) or to a violation of standards of conduct that are often set out in legislative provisions relating to the use of property. However, conduct is not the deciding criterion when it comes to abnormal annoyances under art. 976 C.C.Q. An owner who causes abnormal annoyances without either intent to injure or excessive and unreasonable conduct does not abuse his or her rights, because he or she cannot be accused of wrongful conduct. A finding that abnormal annoyances were caused will therefore not be enough to establish fault in the exercise of a right. On the other hand, an owner who commits a fault may be held liable for damage even if the damage does not reach the level of abnormal annoyances. Article 976 C.C.Q. does not guarantee immunity from the consequences of civil fault. As for the violation of a legislative standard, it will constitute civil fault only if it also constitutes a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. 1457 C.C.Q. [para. 22] [paras. 30-31] [paras. 33-34]

[page395]

In addition to the general rules applicable to fault-based civil liability, it is necessary to recognize a scheme of no-fault civil liability in respect of neighbourhood disturbances under art. 976 C.C.Q. that is based on the annoyances suffered by the victim being excessive rather than on the conduct of the person who allegedly caused them. The inclusion of art. 976 in the book on property confirms that the legislature intended to separate neighbourhood relations from the general rules on obligations. This provision thus relates more to the right of ownership than to the general rules of civil liability. Next, the actual words of art. 976 do not require evidence of wrongful conduct to establish the liability of an owner who has caused excessive neighbourhood annoyances. Moreover, the commentaries of the Civil Code Revision Office and the Minister of Justice support a conclusion that the legislature's intention was not to limit actions relating to neighbourhood disturbances to cases involving the wrongful exercise of a right. Finally, art. 976 is related to other provisions that focus on the result of an act, not on an owner's conduct. A scheme of civil liability based on the existence of abnormal neighbourhood disturbances that does not require proven or presumed fault is also consistent with the approaches taken in Canadian common law and in French civil law. What is more, such a scheme is consistent with general policy considerations, such as the objective of environmental protection and the application of the polluter-pay principle. [para. 3] [para. 20] [para. 37] [paras. 72-75] [para. 80]

The theory of real liability adopted by the Court of Appeal must be rejected. According to this theory, the obligation not to injure one's neighbours must be treated as a charge on every immovable in favour of neighbouring lands. As soon as the limit of normal annoyances is exceeded, the neighbouring owner can set up his or her right against the owner who is at fault by bringing an immovable real action to put an end to the disturbance. As for claims for compensation of a personal nature, they are governed by the traditional rules of civil liability. There are several problems with this approach: rather than a personal action, only an immovable real action would be possible; a remedy under art. 976 C.C.Q. would not be available to lessees or occupants, since they would not be able to claim to have a real right; and it would

as a result be difficult, if not impossible, to institute class actions in situations where art. 976 C.C.Q. applies. [paras. 81-84]

In the instant case, the trial judge concluded that SLC had not committed a civil fault in relation to its statutory obligations. She found that SLC had fulfilled [page396] its obligation to use the best known means to eliminate dust and smoke and had taken reasonable precautions to ensure that its equipment was in good working order at all times and was functioning optimally. Her interpretation of the facts is reasonable, and her analysis of the law is correct. B and C have not shown that the judge made an error in this regard that justified reversing her decision. [paras. 92-94]

Regarding no-fault liability in respect of neighbourhood disturbances under art. 976 C.C.Q., the trial judge said she was convinced that, even though SLC had operated its plant in compliance with the applicable standards, B and C and the members of the group they are representing had suffered abnormal annoyances that were beyond the limit of tolerance neighbours owe each other according to the nature or location of their land. In view of her findings of fact, the trial judge was justified in finding SLC liable under art. 976 C.C.Q. Moreover, she did not misinterpret the word "neighbour" when she concluded that all members living in the neighbourhoods adjacent to the plant were neighbours of the plant for the purposes of art. 976 C.C.Q. on the basis that they lived close enough to it. Although the plaintiff must prove a certain geographic proximity between the annoyance and its source, the word must be construed liberally. [paras. 94-96]

The 1952 special statute respecting SLC did not grant SLC immunity from actions in damages relating to its industrial activities. Although that statute authorized the operation of the plant while requiring that the best means available be used, it in no way exempted SLC from the application of the ordinary law. When the legislature excludes the application of the ordinary law, it generally does so expressly. There is no provision in the special statute precise enough to justify a conclusion that the law of civil liability has been excluded for all consequences of the plant's activities. [paras. 97-98]

Damage relating to events subsequent to the judgment authorizing the class action is not subject to prescription. The application for authorization to institute a class action suspended prescription until the judgment granting the motion was no longer susceptible of appeal (art. 2908 C.C.Q.), and the filing of the action then interrupted prescription (art. 2892 C.C.Q.). According to art. 2896 C.C.Q., such an interruption continues until judgment and has effect in respect of any right arising from the "same source". These words must be interpreted liberally. Here, the source of the continuing [page397] damage suffered by B and C, namely the acts that generated their right of action, remains the same: activities of SLC that caused excessive neighbourhood annoyances. Since those activities continued until 1997, it would make no sense, in addition to being impractical, to ask B and C to repeat their motion every three years for each annoyance suffered. [paras. 99-103] [paras. 106]

Finally, given the trial judge's discretion and the difficulty of assessing environmental problems and annoyances, the trial judge's use of average amounts in determining the quantum of damages was reasonable and appropriate in the circumstances. SLC has not shown that its liability increased as a result, and there is no indication that the amount awarded was based on a wholly erroneous estimate of the injury. The trial court's conclusions on the assessment of damages must therefore be restored. [para. 116]

Cases Cited

Distinguished: *Lapierre v. Quebec (Attorney General)*, [1985] 1 S.C.R. 241; *Christopoulos v. Restaurant Mazurka Inc.*, [1998] R.R.A. 334; **considered:** *Drysdale v. Dugas* (1896), 26 S.C.R. 20; *Canada Paper Co. v. Brown* (1922), 63 S.C.R. 243; *Katz v. Reitz*, [1973] C.A. 230; *Sirois v. Lévesque-Gagné*, [1996] Q.J. No. 2669 (QL); *Gourdeau v. Letellier de St-Just*, [2002] R.J.Q. 1195; **referred to:** *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122; *Brodeur v. Choinière*, [1945] C.S. 334; *Air-Rimouski Ltée v. Gagnon*, [1952] C.S. 149; *Lessard v. Dupont Beaudoin*, [1997] R.D.I. 45; *Morin v. Blais*, [1977] 1 S.C.R. 570; *Compagnie d'assurance Continental du Canada v. 136500 Canada inc.*, [1998] R.R.A. 707; *Union commerciale Compagnie d'assurance v. Giguère*, [1996] R.R.A. 286; *St-Louis v. Goulet*, [1954] B.R. 185; *Comité d'environnement de Ville-Émard (C.E.V.E.) v. Domfer Metal Powders Ltd.*, [2006] Q.J. No. 13631 (QL), application for leave to appeal granted, [2007] 1 S.C.R. viii, appeal discontinued, [2008] 2 S.C.R. v; *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, 2003 SCC 58; *St-Pierre v. Daigle*, [2007] Q.J. No. 1275 (QL), 2007 QCCS 705; *Coalition pour la protection de l'environnement du parc linéaire "Petit Train du Nord" v. Laurentides (Municipalité régionale de Comté des)*, [2005] R.J.Q. 116, motions for appeal and cross-appeal denied, [2005] Q.J. No. 9042 (QL), 2005 QCCA 664; *Dicaire v. Chambly (Ville)*, [2000] Q.J. No. 884 (QL); *Bouchard v. Corp. Stone Consolidated*, [1997] Q.J. No. 4574 (QL); *Arseneault v. Société immobilière [page398] du Québec*, [1997] Q.J. No. 4570 (QL); *Carey Canadian Mines Ltd. v. Plante*, [1975] C.A. 893; *Théâtre du Bois de Coulange inc. v. Société nationale des québécois et des québécoises de la Capitale inc.*, [1993] R.R.A. 41; *Ouimette v. Canada (Procureur général)*, [2002] R.J.Q. 1228; *Allen v. Gulf Oil Refining Ltd.*, [1981] 1 All E.R. 353; *Manchester Corporation v. Farnworth*, [1930] A.C. 171; *Hammersmith and City Railway Co. v. Brand* (1869), L.R. 4 H.L. 171; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181; *Canadian Pacific Railway Co. v. Roy*, [1902] A.C. 220; *Laforest v. Ciments du St-Laurent*, [1974] C.S. 289; *ABB Inc. v. Domtar Inc.*, [2005] R.J.Q. 2267, 2005 QCCA 733; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68; *Thompson v. Masson*, [2000] R.J.D.T. 1548; *Curateur public v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1990] R.J.Q. 359; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

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History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Quebec Court of Appeal (Forget, Pelletier and Morissette JJ.A.), [2006] R.J.Q. 2633, SOQUIJ AZ-50396994, [2006] Q.J. No. 13603 (QL), 2006 CarswellQue 9389, 2006 QCCA 1437, allowing in part an appeal and dismissing an incidental appeal from a decision by Dutil J., [2003] R.J.Q. 1883, SOQUIJ AZ-50173892, [2003] Q.J. No. 5273 (QL), 2003 CarswellQue 994. Appeal dismissed and cross-appeal allowed.

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Counsel

François Fontaine, Andres C. Garin and Gregory Bordan, for the appellant/respondent on cross-appeal.

Jacques Larochelle, for the respondents/appellants on cross-appeal.

Michel Bélanger and William Amos, for the interveners Friends of the Earth and Quebec Environmental Law Centre.

Guy Du Pont, Marc-André Boutin and Brandon Wiener, for the intervener Quebec Business Council on the Environment.

English version of the judgment of the Court delivered by

LeBEL and DESCHAMPS JJ.

I. Introduction

II. *Nature of the Case*

1 Dust they are, and unto dust they shall return, yet human beings have difficulty resigning themselves to living in dust. Sometimes, weary of brooms and buckets of water, they are not unwilling to turn to the courts to get rid of it. This case is proof of that.

2 In this case, Huguette Barrette and Claude Cochrane (the "representatives"), residents of the city of Beauport (now a borough of the city of Québec), instituted a class action against St. Lawrence Cement Inc. ("SLC") for neighbourhood disturbances related to the operation of a cement plant in that city. The Superior Court allowed the class action on the basis that a scheme of no-fault liability in respect of neighbourhood disturbances exists under art. 976 of the *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."). The Court of Appeal allowed SLC's appeal in part with regard to certain aspects of the assessment of damages, but found the company civilly liable on the basis of proven fault under the general rules of civil liability.

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3 In an appeal from the Court of Appeal's decision, this Court must now determine whether in Quebec civil law there is a scheme of no-fault civil liability in respect of neighbourhood disturbances under art. 976 C.C.Q. that applies where the annoyances suffered are excessive. We answer this question in the affirmative and, on that basis and for the reasons that follow, dismiss SLC's appeal. However, the cross-appeal is allowed and the damages awarded by the Superior Court are restored.

B. *Origin of the Case*

(1) Establishment of the Cement Plant

4 This case originated when SLC implemented a plan to establish a large cement plant in Villeneuve (which was later amalgamated with the city of Beauport and then with the city of Québec). SLC was incorporated in 1951 under the *Quebec Companies Act*, R.S.Q. 1941, c. 276, and began building its plant in 1952. Although many lots were still vacant in the area where SLC established its plant, some houses had been built on land adjacent to its property. Moreover, a special statute passed by the Quebec legislature authorized the company to establish its plant in the "municipality of the village of Villeneuve" and conferred additional corporate powers on it (*An Act respecting Atlas Realities Co. -- La Compagnie d'Immeubles Atlas*, S.Q. 1951-52, c. 131 ("SLC Special Act")).

(2) Development of Neighbourhood Problems for the Plant

5 The plant began operating around 1955. Neighbourhood problems quickly arose between SLC and neighbours who were displeased with the consequences of the plant's activities. The evidence shows that environmental incidents occurred as early as 1956 ([2003] R.J.Q. 1883 (Sup. Ct.), at para. 10). In 1974, the Superior Court ordered SLC to compensate a citizen for negligence in firing its cement kilns. The Ministère de l'Environnement then stepped in several times in the 1980s in response to citizens' complaints about problems with dust, odours and noise. In the spring of 1990, SLC agreed to wash houses that had been dirtied during the winter by debris and dust from the plant. It also offered, in 1991 and 1992, to pay to have some residents' cars washed.

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6 The Ministère de l'Environnement received many complaints about environmental incidents (dust from the plant, foul odours) between June 8, 1991 and February 1, 1996. And the plant produced several

environmental incident reports between February 6, 1992 and May 16, 1996 (Sup. Ct., at paras. 243-45; [2006] R.J.Q. 2633, 2006 QCCA 1437, at paras. 27-28).

7 The evidence also shows that SLC invested several million dollars for environmental protection purposes. In particular, it spent more than \$8 million between 1991 and 1995, mostly on the installation of new dust collectors for the kilns (Sup. Ct., at para. 257). SLC stopped operating the plant in 1997, but the disputes with its neighbours continued in the courts.

(3) The Class Action

8 On June 4, 1993, the representatives filed a motion in the Quebec Superior Court for authorization to institute a class action. The motion was granted on March 31, 1994, and the action was filed on August 1, 1994. The representatives alleged various faults in the operation of SLC's plant but also contended that the neighbourhood disturbances caused by the plant were abnormal or excessive. The proposed group was made up of Beauport residents living in areas near the plant. SLC denied any liability and contested the action both at the authorization stage and on the merits.

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C. *Judicial History*

(1) Superior Court

(a) *Judgment Granting Authorization*

9 The application for authorization to institute a class action came before Thibault J., who held that the four conditions set out in art. 1003 of the *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"), had been met. First, regarding the requirement that identical, similar or related questions of law or fact be raised, Thibault J. accepted that the claims for damages were based on the same sources of injury and that the evidence on the plant's liability would be common. She then found that the evidence showed a strong appearance of right and thus that the facts alleged seemed to justify the conclusions sought. Next, the large number of people in the group made the application of art. 59 or 67 *C.C.P.* difficult and impracticable. Finally, Thibault J. concluded that the representatives were in a position to represent the group's members adequately. She therefore granted the motion for authorization to institute a class action and ascribed the status of representative to Huguette Barrette and Claude Cochrane.

(b) *Judgment on the Merits*, [2003] R.J.Q. 1883

10 A few years later, Dutil J. heard the action on the merits. She affirmed the judgment authorizing the institution of a class action. She also found that events subsequent to the filing of the motion for authorization, up to 1997, were relevant to the proceedings.

11 Dutil J. held that SLC was liable on the basis that the annoyances suffered by the representatives and the members of the group were excessive. Despite SLC's efforts to comply with the relevant standards in operating its plant, its emissions of dust, odours and noise had caused abnormal annoyances for its neighbours and it was therefore civilly liable under art. 976 *C.C.Q.* However, Dutil J. did not find that SLC had committed a fault.

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12 Dutil J. found that the scheme of liability under art. 976 C.C.Q. was available to all SLC's neighbours, both lessees and owners. In her opinion, all the group's members lived close enough to SLC to be considered "neighbours" for the purposes of that scheme. Even those who had moved near SLC's plant after it opened were entitled to damages. Dutil J. also held that the statutory authorization given to SLC to operate a cement plant did not give it immunity for damage suffered by its neighbours, and she rejected a prescription argument made in relation to some of the damage.

13 According to Dutil J., the evidence showed that there was a common injury, but that it varied in intensity from one zone to another and from year to year. As a result, she awarded damages that varied from zone to zone. Because it was difficult to determine the exact number of members in each zone, Dutil J. held that group members would have to file individual claims for the damages being awarded (paras. 417 and 423).

(2) Court of Appeal, [2006] R.J.Q. 2633, 2006 QCCA 1437

14 SLC appealed to the Quebec Court of Appeal. The reasons for judgment were written by Pelletier J.A., and Forget and Morissette JJ.A. concurred in them. Pelletier J.A. rejected the theory of no-fault liability in respect of neighbourhood disturbances and instead found SLC liable on the basis of proven fault. The Court of Appeal also intervened to reduce the amount of compensation awarded by Dutil J.

15 The Court of Appeal interpreted the Quebec case law on neighbourhood obligations from the standpoint of real liability (*responsabilité propter rem*) (para. 99). In its opinion, this means that neighbourhood relations impose reciprocal passive charges on the holders of real rights in land, which permits a balance to be struck in the use of neighbouring properties and thus grounds a real rather [page406] than a personal action. As a result, only owners can enjoy the protection of art. 976 C.C.Q. Moreover, a class action cannot be based on that provision, because a class action is a procedural vehicle designed solely for exercising rights belonging to persons.

16 According to the Court of Appeal, a neighbour who seeks to have an owner found personally liable bears the burden of proving fault, a causal connection and injury under the traditional rules of civil liability. Examining SLC's liability from this standpoint, the court found that Dutil J. had erred in assessing the extent of SLC's obligations under the regulatory provisions applicable to its facility. The Court of Appeal found that SLC had an obligation to properly maintain its equipment and to ensure that its equipment functioned optimally during production hours. The court therefore found that SLC had to be able to cease operating, either entirely or partially, as soon as a breakdown occurred, and for as long as was necessary to make repairs. In the Court of Appeal's opinion, the evidence showed that SLC had failed to meet this requirement numerous times during the period covered by the claim. SLC had therefore committed a fault and was, as a result, civilly liable.

17 The Court of Appeal agreed with Dutil J. that the filing of the action by the representatives had suspended and interrupted prescription and that events subsequent to the filing of the action were relevant. It also held that the method of compensation chosen by Dutil J. was acceptable, and it stressed the importance of the Superior Court's discretion in choosing the appropriate recovery method. However, the Court of Appeal found that basing the compensation on average amounts was not appropriate where the damage suffered by owners owing to additional painting work was concerned. It accepted SLC's argument

that [TRANSLATION] "the trial judge wrongly awarded an 'average' compensation amount to every owner in each zone for additional painting expenses that were not incurred by all of them" (para. 241). The [page407] Court of Appeal therefore struck out the amount the Superior Court had awarded to the owners under this head. It also intervened to reduce the compensation awarded to the group members by a percentage amount. Its analysis of civil liability led it to limit the compensation amounts to injuries resulting from the fact that SLC's equipment was not functioning optimally. It therefore reduced the awarded amounts to exclude annoyances not resulting from SLC's fault.

18 SLC appealed to this Court with regard to the Court of Appeal's conclusion that it was liable on the basis of fault and, in the alternative, with regard to the existence of a causal connection between its fault and the damages claimed. It also appealed with regard to the method adopted for determining the quantum of damages, to prescription and to the immunity to which it claims to be entitled under the special statute applicable to its Beauport plant. The representatives cross-appealed, seeking recognition of a no-fault liability scheme applicable to neighbourhood annoyances that are excessive, and of the possibility of instituting a class action under that scheme. They also sought to restore the Superior Court's conclusions on the quantum of damages.

II. Analysis

A. *Issues*

19 In this appeal, the Court must consider the following issues:

- (1) Is civil liability in respect of neighbourhood disturbances in Quebec law necessarily based on fault? Is it possible that a no-fault liability scheme exists? What would the nature of such a scheme be, and how would it apply to the facts of this case?
- (2) Does the special statute passed by the Quebec legislature to govern SLC's activities confer [page408] immunity on SLC for neighbourhood disturbances?
- (3) Did the representatives' lawsuit interrupt prescription for damage suffered after it was filed?
- (4) Was it appropriate for the courts below to use average amounts in assessing the damage suffered by the members of the group covered by the class action?

B. *General Framework for the Discussion on Civil Liability in Respect of Neighbourhood Disturbances*

20 The main issues that arise in this appeal relate to the legal nature of the regime of civil liability in respect of neighbourhood disturbances in Quebec law. In reviewing the disagreements among judges and commentators over the content of this regime, it becomes clear that the basic issue is whether the Court should recognize or reject a liability scheme based on the extent of the annoyances suffered by the victim rather than on the conduct of the person who allegedly caused them. A no-fault liability regime would be in addition to the ordinary rules of civil liability. Before this form of liability is examined, it must be determined how civil liability based on fault can apply in the context of neighbourhood disturbances.

C. *Fault-Based Liability*

21 Article 1457 C.C.Q. sets out the general rules of fault-based liability as follows:

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

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He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

The first rule imposes a general duty to abide by the rules of conduct that lie upon a person having regard to the law, usage or circumstances (Ministère de la Justice, *Commentaires du ministre de la Justice: Le Code civil du Québec -- Un mouvement de société* (1993), vol. I, at p. 886). Civil fault [TRANSLATION] "is the difference between the agent's conduct and the abstract, objective conduct of a person who is reasonable, prudent and diligent" (J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (7th ed. 2007), vol. I, at p. 171; see also J. Pineau and M. Ouellette, *Théorie de la responsabilité civile* (2nd ed. 1980), at p. 7). The standard of civil fault thus corresponds to an obligation to act reasonably, prudently and diligently and can be characterized as an obligation of means (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (6th ed. 2005), by P.-G. Jobin in collaboration with N. Vézina, at p. 38; P.-A. Crépeau, *L'intensité de l'obligation juridique ou Des obligations de diligence, de résultat et de garantie* (1989), at p. 55). The basis for civil liability remains the same whether the impugned conduct is intentional or unintentional (Baudouin and Deslauriers, at p. 165). The purpose of civil liability is [TRANSLATION] "not to blame or punish but only to compensate for loss" (Baudouin and Deslauriers, at p. 9; see also Pineau and Ouellette, at p. 60). Intent to injure is therefore not necessary to trigger liability (Baudouin and Deslauriers, at p. 9).

22 In the context of neighbourhood disturbances, civil fault may relate either to the abusive exercise of a right of ownership or to a violation of standards of conduct that are often set out in statutory or regulatory provisions relating to the use of property. We will consider these two types of civil fault.

(1) Abuse of Rights and Fault

23 Although the doctrine of abuse of rights has long been the subject of debate or dispute, there is no question that it has been accepted in Quebec [page410] civil law, in which it now has an important place, as this Court recognized in *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122. The doctrine has now been codified in art. 7 C.C.Q.:

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

(See *Commentaires du ministre de la Justice*, vol. I, at p. 8.)

24 Article 7 C.C.Q. thus gives effect to the principle of the relativity of rights, which applies to rights as absolute in theory as the right of ownership. According to this principle, one person's right necessarily limits that of another person, and to uphold all such rights concurrently will reduce the absoluteness of each (A. Nadeau and R. Nadeau, *Traité pratique de la responsabilité civile délictuelle* (1971), at pp. 227-28). This is true of all rights that are protected in civil law. Such rights remain limited by their coexistence

and by the fact that they conflict with one another. As Albert Mayrand writes, "[a]ll rights have limitations; when a person under the pretense of exercising an actual right goes beyond the sphere of that right, it is said that he has committed an abuse of right" ("Abuse of Rights in France and Quebec" (1974), 34 La. L. Rev. 993, at p. 993; see also J. Ghestin and G. Goubeaux, *Traité de droit civil -- Introduction générale* (3rd ed. 1990), at p. 678).

25 Article 7 C.C.Q. places two limits on rights: a right may be exercised neither with the intent of causing injury nor in an excessive and unreasonable manner. These limits constitute a codification of the prior case law and establish the point beyond which the exercise of a right becomes abusive (M. Ouellette, "Book One: Persons", in *Reform of the Civil Code* (1993), vol. 1-A, at p. 5; for examples of judgments on neighbourhood disturbances, see *Brodeur v. Choinière*, [1945] C.S. 334; *Air-Rimouski Ltée v. Gagnon*, [1952] C.S. 149; *Lessard v. Dupont Beaudoin*, [1997] R.D.I. 45 (Sup. Ct.)). An abuse of rights relates to the exercise of a right whose legitimacy is not at issue (*Commentaires du [page411] ministre de la Justice*, vol. I, at p. 8; Ghestin and Goubeaux, at pp. 678-79).

26 This leads to the following question: Does the concept of abuse of rights under art. 7 C.C.Q. correspond to a scheme of civil liability separate from that of arts. 1457 and 1458 C.C.Q.? Civil law commentators in Quebec generally answer that abuse of rights constitutes civil fault in the exercise of a right (Baudouin and Deslauriers, at pp. 192-93; P.-C. Lafond, *Précis de droit des biens* (2nd ed. 2007), at pp. 425-26; Ouellette, at p. 5; D.-C. Lamontagne, "Special Rules on the Ownership of Immovables and Servitudes", in *Reform of the Civil Code* (1993), vol. 1-A, at p. 6; Pineau and Ouellette, at p. 73; Mayrand, at p. 997; Nadeau and Nadeau, at pp. 228-29). French civil law commentators seem to take a similar view (P. Malaurie, L. Aynès and P. Stoffel-Munck, *Les obligations* (2nd ed. 2005), at p. 56; J. Flour, J.-L. Aubert and É. Savaux, *Les obligations*, vol. 2, *Le fait juridique* (10th ed. 2003), at p. 118; B. Starck, H. Roland and L. Boyer, *Obligations*, vol. 1, *Responsabilité délictuelle* (5th ed. 1996), at pp. 176-77; Ghestin and Goubeaux, at p. 694; G. Marty and P. Raynaud, *Les obligations*, vol. 1, *Les sources* (2nd ed. 1988), at p. 542; H. and L. Mazeaud and A. Tunc, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (6th ed. 1965), t. 1, at p. 640).

27 However, Ghestin and Goubeaux rightly point out that there is something peculiar about extending the concept of fault to abuse of rights:

[TRANSLATION] Of course, most decisions penalizing abuse of rights refer to article 1382 of the [French] Civil Code. This does not necessarily mean that abuse constitutes fault in the exercise of a right. If ... it is accepted that the term "abuse of rights" refers to a specific limit on a right, it is clear that a person who so "abuses" his or her right actually acts wrongfully and becomes liable. Article 1382 of the Civil Code does indeed provide a basis for a penalty for the abusive act. However, the presumption that the act is lawful must *first* be rebutted by proving abuse, which makes it possible to show fault.

There is certainly some truth to the theory of fault in the exercise of rights, but this is not really how the question is resolved. Control is exercised through the [page412] mechanism of civil liability. However, to say that abuse results from fault "is to answer the question with a question and to see a cause in what is merely a consequence". Thus, "to get to the question of liability, the question of abuse of rights must be resolved first". This is why the identification of an autonomous criterion for abuse of rights remains of the utmost importance. [Emphasis in original; footnotes omitted; pp. 693-94.]

28 French authors Flour, Aubert and Savaux also comment on the need to consider the context when analysing the application of the concept of fault to abuse of rights:

[TRANSLATION] [F]ault in the exercise of a right cannot be judged by the same standards as fault in other circumstances. Usually, the mere fact of not foreseeing the possibility of avoidable damage and not doing something to prevent it is wrongful. A right necessarily gives its holder a degree of impunity, however... .

This leads to the conclusion that, in most cases, the fact that a person who causes damage has a right does not constitute an automatic justification. However, this circumstance will likely result in a relaxation of the usual conditions of liability. [p. 118] (See also Lafond, at p. 426.)

29 Where a right exists, therefore, the usual application of the concept of fault is qualified. The holder of a right has a sphere of autonomy in exercising that right. In such a context, it thus becomes crucial, when analysing civil liability, to consider the nature of the right in issue and the circumstances in which it is exercised, since, as Ghestin and Goubeaux note, an *abuse* of rights must be found in order to show fault. Once an abuse is found, the holder of the right loses the protection of the sphere of autonomy that flows from the right. Violation of a standard of conduct is therefore inextricably linked to the concept of abuse of rights.

(2) Abuse of Rights, Abnormal Annoyances and Art. 976 C.C.Q.

30 However, conduct is not the deciding criterion when it comes to abnormal annoyances under art. 976 C.C.Q.:

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976. Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.

An owner who causes abnormal annoyances without either intent to injure or excessive and unreasonable conduct [TRANSLATION] "does not abuse his or her rights, because he or she cannot be accused of wrongful conduct" (Lafond, at p. 404). The word "abuse" implies blame and [TRANSLATION] "is ill-suited to an attitude that may in itself be beyond reproach" (Ghestin and Goubeaux, at p. 686).

31 A finding that abnormal annoyances were caused will therefore not be enough to establish fault in the exercise of a right. On the other hand, an owner who commits a fault may be held liable for damage even if the damage does not reach the level of abnormal annoyances. Article 976 C.C.Q. does not guarantee immunity from the consequences of civil fault. According to Professors G. Viney and P. Jourdain, such an immunity, if accepted, [TRANSLATION] "would make the existence of a neighbourhood disturbance the only possible ground for liability, one that would apply even in cases of proven fault, and would encourage polluters not to comply with regulations in the hope that any nuisances they caused would be found tolerable" (*Traité de droit civil -- Les conditions de la responsabilité* (2nd ed. 1998), at p. 1086). Even though art. 976 C.C.Q. incorporates a duty to tolerate normal neighbourhood annoyances, this does not mean that it authorizes wrongful conduct.

(3) Fault and Violation of the Law

32 Standards provided for in statutes and regulations also place limits on rights and on the exercise thereof. Many examples of this can be found in the *Civil Code of Québec*, in zoning rules and in environmental standards. As a result, the question of the relationship between violations of the law and civil liability needs to be examined.

33 As we noted above, the general rules of civil liability set out in art. 1457 *C.C.Q.* are based on fault (Baudouin and Deslauriers, at p. 149). [page414] [TRANSLATION] "This is a universal concept, since it applies every time a victim alleges that a person who caused injury is liable under the general rules" of art. 1457 *C.C.Q.* (P.-G. Jobin, "La violation d'une loi ou d'un règlement entraîne-t-elle la responsabilité civile?" (1984), 44 *R. du B.* 222, at p. 223). To answer this question, the standards provided for in statutes and regulations, often called "legislative standards", must be analysed in light of the basic concept of civil fault.

34 In Quebec civil law, the violation of a legislative standard does not in itself constitute civil fault (*Morin v. Blais*, [1977] 1 S.C.R. 570; *Compagnie d'assurance Continental du Canada v. 136500 Canada inc.*, [1998] R.R.A. 707 (C.A.), at p. 712; Jobin, at p. 226). For that, an offence provided for in legislation must also constitute a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. 1457 *C.C.Q.* (*Union commerciale Compagnie d'assurance v. Giguère*, [1996] R.R.A. 286 (C.A.), at p. 293). The standard of civil fault corresponds to an obligation of means. Consequently, what must be determined is whether there was negligence or carelessness having regard to the specific circumstances of each disputed act or each instance of disputed conduct. This rule applies to the assessment of the nature and consequences of a violation of a legislative standard.

35 The French position is different. In French law, the violation of a legislative standard in itself constitutes civil fault (Jobin, at p. 229). This means that it is not necessary [TRANSLATION] "to find ... negligence, imprudence, carelessness or something deficient in the conduct of the person who caused the injury" (Viney and Jourdain, at p. 328). Thus, where a legislative standard is violated, the general rules of civil liability transform the standard into an obligation of result, since the victim can [TRANSLATION] "establish fault by proving a simple material fact without having to show that the conduct of the person who caused the injury was also morally or socially blameworthy" (Viney and Jourdain, at p. 342).

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36 In Quebec, art. 1457 *C.C.Q.* imposes a general duty to abide by the rules of conduct that lie upon a person having regard to the law, usage or circumstances. As a result, the content of a legislative standard may influence the assessment of the duty of prudence and diligence that applies in a given context. In a civil liability action, it will be up to the judge to determine the applicable standard of conduct -- the content of which may be reflected in the relevant legislative standards -- having regard to the law, usage and circumstances.

D. No-Fault Liability

(1) Preliminary Comments

37 In addition to the general rules applicable to fault-based civil liability, it is necessary to consider the

possibility of liability in situations where neighbours suffer abnormal annoyances but the owner who causes the damage has not committed a fault.

38 There is no consensus regarding the theory of no-fault liability in the context of neighbourhood annoyances. As we will see, however, the existence of this form of liability is not precluded by the wording or legislative history of art. 976 C.C.Q. or by developments in the case law and commentaries from before and after the enactment of the *Civil Code of Québec*. On the contrary, these sources provide support for it. In addition, reviews of both comparative law and general policy considerations favour the acceptance of no-fault liability.

(2) Case Law and Commentaries Predating the Enactment of Art. 976 C.C.Q.

39 Although the *Civil Code of Lower Canada* ("C.C.L.C.") contained no provisions governing neighbourhood relations, there were several decisions in which courts explicitly recognized, if not the theory of no-fault liability in the context of neighbourhood relations, at least the principle that an owner must compensate neighbours to whom he or she has caused excessive annoyances.

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40 It should be mentioned, however, that prior to the enactment of the new Code, neighbours involved in legal proceedings, and the courts hearing such cases, generally relied on art. 1053 C.C.L.C. Nonetheless, in some cases courts allowed actions on the basis of evidence of excessive annoyances without requiring that the existence of a fault be established. Moreover, absence of fault was not always a defence. After analysing numerous Quebec judgments from the first half of the 20th century in which the defendants were found civilly liable owing to excessive annoyances (nuisance), Ronald I. Cohen observed:

To most civilian legal minds, art. 1053 means "fault" and "fault" connotes an illicit act or at least an actor who has not acted "en bon père de famille", who has not, in other words, taken all reasonable care to avoid the damage... .

Although a few isolated Quebec cases support the above view ... the jurisprudence almost uniformly supports the proposition that the proprietor is subject to liability as regards the damage caused once he is shown to be the author of the nuisance.

In general, the Quebec courts have not boldly articulated this principle and have been content, upon finding the existence of a nuisance of unreasonable dimensions, to close their inquiry there without deciding whether reasonable care was, or could have been, taken to avoid the damage, thus coming to the same thing in the end... . The problem, not surprisingly, arises where there is unequivocal evidence to the effect that all reasonable care *has* been taken to avoid the damage. On the several occasions when the Quebec courts have been faced with the situation where the greatest care had evidently been taken to avoid the nuisance, they have held that it was no defence to the action.

("Nuisance: A Proprietary Delict" (1968), 14 McGill L.J. 124, at pp. 136-38 (emphasis in original))

41 Three decisions of the Supreme Court of Canada and the Quebec Court of Appeal are often relied on in support of the argument that prior to the 1994 codification, the concept of no-fault liability triggered by

a finding of excessive annoyances [page417] was accepted in Quebec civil law. Those judgments need to be examined more closely.

42 The first is *Drysdale v. Dugas* (1896), 26 S.C.R. 20. In it, Dugas, the owner of a house located in a residential area near a stable operated by Drysdale, complained of disagreeable odours, noise made by the horses at night and fetid liquids penetrating the basement of his house. Dugas claimed damages and asked that the stable cease operating. This Court affirmed the decisions of the lower courts, which had awarded him damages for the annoyances he had suffered. Although Strong C.J. began by finding that the law applicable to the case was the law set out in art. 1053 *C.C.L.C.*, he added that, in Quebec law as in English common law, enjoyment of the right of ownership was subject to respect for the rights of neighbouring owners. The Chief Justice also stressed the similarity between English and French law on the subject of nuisance. He then stated the proposition, based on an analysis of English case law, that "occupiers of lands and houses have a right of action to recover damages for any interference with the comfort and convenience of their occupation" (p. 23). Finding that there was no question that Dugas had suffered annoyances and that the disagreeable odours from the stable constituted a nuisance, Strong C.J. concluded that Drysdale was liable to Dugas and that Dugas was entitled to damages. The fact that Drysdale had shown care and caution in operating his stable -- and thus that there was no fault -- did not exempt him from liability (pp. 25-26).

43 In concurring reasons with which Strong C.J. agreed (p. 23), Taschereau J. situated his analysis in the framework established by French authorities. Noting that in the case before the Court, the odours, [TRANSLATION] "by their continuity and intensity, exceed the limits of the normal inconveniences that cannot be dissociated from the neighbourhood", Taschereau J. wrote that the commentators and the courts [TRANSLATION] "agree that, in [page418] such a case, an action in damages lies against the person who committed the injurious act" (p. 27). As a result, Drysdale could operate his stable only if he compensated his neighbours for the damage he caused them. Taschereau J. therefore attached more importance to the damage suffered by the plaintiff than to the defendant's acts. Thus, Strong C.J. and Taschereau J. agreed on the existence of a scheme of no-fault liability even though their reasons were based on different analytical frameworks.

44 The second decision is *Canada Paper Co. v. Brown* (1922), 63 S.C.R. 243. In that case, Brown, a neighbour of a pulp and paper mill, sued the mill's operator over noxious odours and fumes that resulted from the use of sulphate-based manufacturing processes. The reasons for judgment in the case, which began as a demand for an injunction, show that the judges agreed only in part. Thus, in allowing Brown's demand, Duff J. favoured the theory of liability based on fault pursuant to art. 1053 *C.C.L.C.* (p. 251). Anglin J., writing for himself and Davies C.J., referred to the concept of nuisance and confirmed that the annoyances suffered by the plaintiff were in excess of anything that could be justified in the context of neighbourhood relations and were therefore actionable (pp. 254-55). Finally, Brodeur J. relied both on abuse of the right of ownership and on excessive annoyances caused by the odours (p. 260).

45 Despite these differences in the reasons of the members of the Court, some Quebec commentators viewed the case as amounting to a recognition of no-fault liability in respect of neighbourhood disturbances. For example, Louis Baudouin wrote in 1953 that in *Drysdale* and *Canada Paper*, the Court had sought to identify an excessive injury [TRANSLATION] "whose cause lay not in malicious intent in exercising a legitimate right, but rather in objective limits on the right of ownership" (*Le droit civil de la Province de Québec: Modèle vivant de Droit comparé* (1953), at p. 1285 (emphasis added)). This concept

of objective limits on the right of ownership relates not to the owner's *conduct*, but to the consequences of the owner's use of his or her [page419] property. Likewise, Pratte J.A. of the Quebec Court of Appeal pointed out in an oft-quoted passage that in those two cases, this Court had accepted a principle of inherent limits on the right of ownership:

[TRANSLATION] The right of owners to use their things as they see fit entails an obligation not to exercise that right in a manner that prevents neighbours from enjoying their own property. Of course, because we live in society, each person must suffer the unavoidable annoyances resulting from this situation, but the sum of those annoyances must not be greater than is necessary to reconcile conflicting rights.

(*St-Louis v. Goulet*, [1954] B.R. 185, at p. 191 (emphasis added))

46 Despite the vagueness of the legal concepts referred to by the judges of this Court in *Canada Paper*, the judges expressed an intention to protect neighbours from excessive annoyances that arise in neighbourhood relations. Moreover, it is difficult to explain the Court's decision in terms of the concept of civil fault based on the diligent person standard.

47 Finally, in *Katz v. Reitz*, [1973] C.A. 230, the Quebec Court of Appeal explicitly endorsed the theory of no-fault liability in respect of neighbourhood disturbances. Reitz owned a lot and a house when Katz purchased neighbouring lots separated from Reitz's property by a lane. In order to build an apartment building, a company hired by Katz dug a deep hole on Katz's lot that caused Reitz's house to collapse (pp. 231-34).

48 The Court of Appeal found that Katz had not committed a fault. He had hired a third party with the necessary experience and skill to perform the work (pp. 235-36). However, Katz's right to exercise his right of ownership remained limited by Reitz's right to enjoy his property:

[TRANSLATION] However absolute it may be, the exercise of the right of ownership includes an obligation not to injure one's neighbours and to compensate them for damage which the exercise of this right may [page420] cause them. This obligation exists even in the absence of fault, and in that case results from the neighbours' right to enjoy their property undisturbed and to be compensated for losses which they suffer against their will from work done by another for the other's advantage and profit. [Emphasis added; p. 237.]

49 These three decisions thus showed at least partial acceptance, even prior to the new codification, of no-fault liability in respect of neighbourhood disturbances. However, following a subsequent judgment of this Court, *Lapierre v. Quebec (Attorney General)*, [1985] 1 S.C.R. 241, there was some question whether this view was still valid.

50 In *Lapierre*, a child had contracted encephalitis after being vaccinated for measles pursuant to a provincial routine vaccination policy. The Superior Court found the government civilly liable on a no-fault basis. The Court of Appeal set aside that judgment and dismissed the action. This Court affirmed the Court of Appeal's judgment and refused to find the government liable. Chouinard J., writing for the Court, criticized, *inter alia*, the theory of risk, pursuant to which fault is not necessary. According to that theory, any act that causes damage, whether due to fault or not, attracts liability (p. 265, referring to Mazeaud and Tunc, at p. 431, No. 339). In Chouinard J.'s view, the theory of risk was not accepted in Quebec law. Chouinard J. also briefly considered the argument that *Katz* had opened the door to "recognizing the

theory of risk" (p. 265). He rejected that view and preferred to interpret *Katz* as a decision based on fault and abuse of rights (p. 266).

51 In light of that decision, some judges have denied any possibility of no-fault liability in respect of neighbourhood disturbances in Quebec law. For example, that was the basis for the Court of Appeal's decision in *Christopoulos v. Restaurant Mazurka Inc.*, [1998] R.R.A. 334, to exempt from liability two owners who had not been at fault when the collapse of their building caused a wall between it and a neighbouring building to collapse.

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52 In view of Chouinard J.'s comments on the non-acceptance of the theory of risk in Quebec law, the real scope of *Lapierre* requires some clarification. The case concerned not neighbourhood disturbances, but a provincial routine vaccination policy, which, according to the plaintiff in that case, had caused a problem of delictual liability. As Professor Lafond points out, Chouinard J. did not rule out the possibility of no-fault liability in respect of the exercise of rights of ownership, particularly in the context of neighbourhood disturbances. In fact, the Court did not deal with the issue in *Lapierre*:

[TRANSLATION] [I]n *Lapierre*, the ... Court did not conclusively rule out the possibility of strict liability in connection with the right of ownership It seems clear to us that [the Court], in deciding a traditional civil liability case, did not want to hold that no-fault liability is *widely* available in Quebec law.

(Lafond, at p. 449 (emphasis in original))

The relevance of that decision to neighbourhood disturbances becomes even more questionable in the context of the *Civil Code of Québec*, as the wording of the new Code's relevant provision, and the inspiration for it, differ from those of the former Code in this regard. At this point, a review of the legal situation created when the new Code came into force in 1994 is relevant.

(3) Coming Into Force of the *Civil Code of Québec*: Art. 976 C.C.Q. and No-Fault Liability

53 We will begin by examining the legislature's intention in codifying art. 976 C.C.Q. and will then discuss the cases and commentaries in which the nature of liability in respect of neighbourhood disturbances under the *Civil Code of Québec* has been considered.

(a) *Legislature's Intention*

54 The legislative history of art. 976 C.C.Q. begins with the work of the Civil Code Revision [page422] Office. In its 1975 *Report on Obligations* to the Office, the Committee on the Law of Obligations suggested that a specific provision on neighbourhood relations be included in the book on obligations. The proposed provision read as follows:

95. No person may cause any damage to another beyond the normal inconveniences resulting from proximity.

The jurists who made this recommendation explained that the source of this obligation in Quebec law was either the remedy for abuse of rights or the remedies based on nuisance. They took care to distinguish the

obligation described in this art. 95 from the one provided for in art. 1053 *C.C.L.C.* and explained that the obligation not to inconvenience one's neighbour applied even in the absence of fault:

The legal obligation of good-neighbourliness, set forth in Article 1057 C.C., is here further defined as an obligation not only of diligence, but of refrainment from causing any "gênes intolérables", regardless of whatever measures have been taken to eliminate such inconveniences.

This obligation has long been acknowledged by Quebec law, which has referred to it as either an abuse of right or, as in Common Law, a "nuisance". It has recently been correctly defined as a specific legal obligation, distinct from both the obligation set forth in Article 1053 C.C. and the concept of fault implied by that article.

Thus, this article compels all persons, and not only landowners, not to inconvenience their neighbours. This obligation holds even if there is no fault and regardless of any administrative authorization.

(Civil Code Revision Office, Committee on the Law of Obligations, *Report on Obligations* (1975), at p. 149)

55 In its 1977 *Report on the Québec Civil Code*, the Office in turn proposed including a provision on neighbourhood disturbances in the book on obligations. The recommendation in this report was worded in substantially the same way as the one made two years earlier:

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96 No person may cause to another damage which exceeds the normal inconveniences resulting from proximity.

(Civil Code Revision Office, *Report on the Québec Civil Code* (1978), vol. I, *Draft Civil Code*, at p. 346)

This proposal was supported by a commentary identical to the above-quoted commentary by the Committee on the Law of Obligations (Civil Code Revision Office, *Report on the Québec Civil Code* (1978), vol. II, t. 2, *Commentaries*, at pp. 619-20).

56 However, the legislature did not adopt the two proposals reproduced above, which would have imposed a positive obligation on owners not to cause excessive inconveniences to neighbours. Instead, art. 976 C.C.Q. was included in the book entitled "Property". It provides for a passive obligation of tolerance, as neighbours are told to suffer normal neighbourhood annoyances. Once again, this article reads as follows:

976. Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.

57 This provision is silent on the question of liability resulting from neighbourhood annoyances.

58 The Minister's commentaries concerning the chapter on the ownership of immovables referred to [TRANSLATION] "the general principle of tolerance to be observed in neighbourhood relations" (*Commentaires du ministre de la Justice*, vol. I, at p. 569). The Minister noted that [TRANSLATION] "the new Code restates most of the traditional rules but modernizes them by taking greater account of environmental legislation, the value of water and the quality of life" (*Commentaires du ministre de la*

Justice, vol. I, at p. 570). According to the Minister, art. 976 C.C.Q. is based on judge-made law. Initially developing that case law on the basis of the concept of abuse of rights, the courts had gradually created specific legal rules for neighbourhood disturbances:

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[TRANSLATION] This article is new. It refers to the principle that tolerance must be shown in neighbourhood relations and codifies that principle in a general provision that heads up and underlies the entire chapter. It thus codifies the academic commentaries and case law on neighbourhood disturbances, which were originally founded primarily on abuse of the right of ownership before a specific framework was established for neighbourhood disturbances. [p. 573]

Thus, the Minister's view was that the courts, in decisions on neighbourhood relations, had adopted a rule that owners must compensate neighbours to whom they cause excessive annoyances. Even though art. 976 C.C.Q. is worded as a duty of tolerance, therefore, it codifies a line of authority according to which owners are not to be exempted from liability for damage associated with excessive annoyances they have caused for their neighbours. Moreover, consistently with *Drysdale*, *Canada Paper* and *Katz*, the article does not state that fault must be proved to obtain compensation for abnormal neighbourhood annoyances.

59 Since the enactment of the *Civil Code of Québec*, there have been cases in which the Quebec Court of Appeal has decided in favour of a scheme of no-fault liability based on art. 976 C.C.Q. In other decisions, however, the same court has disagreed with relying on this provision as a source of civil liability.

(b) *Case Law of the Court of Appeal on Art. 976 C.C.Q.*

60 Some hesitation about the basis of civil liability in respect of neighbourhood disturbances and, more specifically, about accepting no-fault liability can be seen in the decisions of the Court of Appeal since the new Civil Code came into force.

61 As we mentioned above, the Court of Appeal rejected no-fault liability in *Christopoulos*. In that case, the Court of Appeal expressed the view that the theory of no-fault liability had been rejected in *Lapierre* in the context of the *Civil Code of Lower Canada* (p. 350). It added that art. 976 C.C.Q. had not changed the state of the law. The court cited [page425] Professor Claude Masse, who asserted that the addition of art. 976 C.C.Q. had not established a scheme of no-fault liability in respect of neighbourhood disturbances (p. 350). We mentioned above our reservations about the application of *Lapierre* to cases concerning neighbourhood disturbances. We cannot accept *Christopoulos* insofar as it is based on *Lapierre*. It should also be noted that the applicable law in *Christopoulos* was that of the *Civil Code of Lower Canada* and that the Court of Appeal referred only briefly to art. 976 C.C.Q.

62 However, the Court of Appeal adopted the same position more recently in *Comité d'environnement de Ville-Émard (C.E.V.E.) v. Domfer Metal Powders Ltd.*, [2006] Q.J. No. 13631 (QL), leave to appeal granted, [2007] 1 S.C.R. viii; appeal discontinued on August 31, 2007, [2008] 2 S.C.R. v. In that case, Forget J.A., relying on the Court of Appeal's reasons in the judgment under appeal in the case at bar, stated that he would be reviewing the facts in light of the [TRANSLATION] "standard theory of fault-related civil liability" (para. 125). He thus rejected the theory of no-fault civil liability in respect of neighbourhood disturbances. The judgment in *Domfer* was rendered the same day as the Court of Appeal's

judgment in the instant case. We will explain below why the theory of real liability that the Court of Appeal adopted in these two cases should be rejected.

63 The Court of Appeal has also accepted the possibility of no-fault liability for neighbourhood disturbances in two cases. In the first, *Sirois v. Lévesque-Gagné*, [1996] Q.J. No. 2669 (QL), two lots overlooked Ms. Lévesque-Gagné's property. A hill with an irregular slope rose above the line separating the three lots. The foot of the hill crossed over that line. Ms. Lévesque-Gagné, who wanted to level her lot, began excavation work that eliminated the slope on it but caused erosion on the neighbouring lots.

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64 Mailhot J.A., writing for a unanimous Court of Appeal, quoted *Katz* with approval and held that Ms. Lévesque-Gagné's right to modify her own property [TRANSLATION] "is of course limited by the equally indisputable right of [her neighbours] to the peaceful enjoyment of their property" (para. 40). Mailhot J.A. found that the facts in *Katz* differed from those of the appeal before her, because [TRANSLATION] "Ms. Lévesque-Gagné knew that the excavation work she was undertaking could cause the partial ruin and slumping of parts of the neighbouring properties" (para. 41). Nevertheless, in her view, the principle stated in *Katz* still applied. Mailhot J.A. accordingly concluded that [TRANSLATION] "an owner of land, although enjoying the freedom of an owner, may not alter the property in such a way as to cause, as here, a significant foreseeable loss on or deterioration of neighbouring properties" (para. 43).

65 The question of liability for damage resulting from neighbourhood disturbances came before the Court of Appeal again in *Gourdeau v. Letellier de St-Just*, [2002] R.J.Q. 1195. In that case, the owner of an immovable had built two concrete walls that were supported by the wall of the building next door. Over time, the presence of the concrete walls caused his neighbour annoyances and use problems that gave rise to an action to demolish them that was based on abuse of rights. In discussing the legal problems caused by the construction of the walls, Thibault J.A., writing for the majority of the Court of Appeal, accepted a theory of liability based on the extent of the annoyances suffered rather than on proof of fault (para. 44).

66 In support of that conclusion, Thibault J.A. relied, *inter alia*, on the wording of art. 976 C.C.Q., which [TRANSLATION] "does not suggest that it applies only where fault is demonstrated" (para. 39). She added that the source of art. 976 C.C.Q. [TRANSLATION] "seems to lie in a balance between the use of one property and the use of neighbouring properties", and she referred to the principles laid down in *Katz* (paras. 40-41). Turning to the case before her, Thibault J.A. found that the owners -- whose predecessor in title had built the [page427] walls -- were liable because the work, although lawful, had caused abnormal annoyances for the neighbours:

[TRANSLATION] In the absence of a servitude of view in favour of the appellants' immovable, the respondent's predecessor in title had the right, and a very legitimate one at that, to protect his privacy. But the chosen method far exceeded what was normal and acceptable. In light of the objective being pursued, the height of the walls was disproportionate and excessive, and the configuration of the walls was totally unacceptable. In exercising the right to privacy, it was necessary to respect the neighbours' right to have access to their property and to enjoy, not a right of view, but the benefits of air and light.

It is precisely in such situations that the rules of good neighbourliness must apply. Competing rights come into conflict, but no one has to suffer abnormal annoyances resulting from a neighbour's excessive acts. [paras. 47-48]

67 Thus, in *Gourdeau*, the Court of Appeal explicitly accepted an interpretation of art. 976 C.C.Q. based on the extent of the annoyances suffered rather than on an assessment of the owner's conduct.

(c) *Quebec Commentators and No-Fault Liability in Respect of Neighbourhood Disturbances*

68 Most Quebec commentators seem to favour the theory of no-fault liability in respect of neighbourhood disturbances. For example, Professor Lafond agrees that an action relating to neighbourhood disturbances lies even where there is no proof of fault, malice or excessive conduct by an owner of land. In his view, proof of abnormal or intolerable annoyances suffered by a neighbour will be enough to justify such an action (Lafond, at p. 404; *contra*: C. Masse, "Civil Liability", in *Reform of the Civil Code* (1993), vol. 2-B, at pp. 13-14). According to A. Popovici, the determining factor is the *result* of the owner's act (that is, the abnormal disturbance or excessive annoyance) rather than the owner's *conduct* ("La poule et l'homme: sur l'article 976 C.c.Q." (1997), 99 *R. du N.* 214, at p. 221).

[page428]

69 Baudouin and Deslauriers point out that art. 976 C.C.Q. does not explicitly refer either to intent to injure or to excessive and unreasonable exercise of the right of ownership. In their opinion, art. 976 C.C.Q. confirms the line of cases in which liability was recognized as being based on the existence of abnormal neighbourhood annoyances rather than on proof of fault (p. 202).

70 However, noting that there is disagreement on this point, Baudouin and Deslauriers associate liability in this area with fault-based liability. Where an excessive annoyance (and thus an injury) exists, fault can be *presumed*. According to these authors, since art. 1457 C.C.Q. makes [TRANSLATION] "breaking the law a civil fault" and art. 976 C.C.Q. sets out [TRANSLATION] "an objective legislative standard in this regard" (at p. 202), an owner will necessarily be liable for abnormal annoyances:

[TRANSLATION] The controversy over whether fault is necessary may thus be more apparent than real; fault exists once excess does, and the recognition of an injury gives rise to a presumption of fault. [p. 203]

71 With respect, we are not convinced that relying on the concept of presumed fault is helpful. The assessment of fault is based on the way a reasonable, prudent and diligent person would behave in objectively similar circumstances. By presuming fault on an owner's part solely because his or her neighbour has suffered excessive annoyances, the analysis confuses an examination of *conduct* (whether the owner acted as a reasonable, prudent and diligent owner) with an examination of the *result* (whether the neighbour suffered excessive annoyances). Finally, it is contradictory to conclude that for an owner to cause abnormal annoyances for a neighbour amounts to fault after finding that the owner did not, in actual fact, commit any fault (Lafond, at p. 406, and Popovici, at p. 221). A finding of abnormal annoyances is therefore not enough to establish that a fault has been committed.

[page429]

(d) *Summary of the Legislative History, of the Case Law, and of Commentaries on Art. 976 C.C.Q.*

72 Although the drafts prepared by the Civil Code Revision Office proposed that an article on neighbourhood relations be included in the book on obligations, the legislature ultimately decided to put art. 976 C.C.Q. in the book on property. The decision to do so is important to the interpretation and application of this provision. In this regard, this Court recently noted that "[t]he organization of rules is an essential feature of codification" (*Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34, at para. 14; see also para. 15). It might be thought that the inclusion of the provision on neighbourhood relations in the book on property confirms that the legislature intended to separate neighbourhood relations from the general rules on obligations and those on civil liability. On this point, we agree with Thibault J.A., who explained in *Gourdeau* why, owing to the location of art. 976 in the Code, this provision relates more to the right of ownership than to the general rules of civil liability:

[TRANSLATION] [A]rticle 976 C.C.Q. is found under Title Two, *Ownership* (arts. 947 to 1008), and is the general provision of Chapter III, *Special rules on the ownership of immovables* (arts. 976 to 1008), in which the legislature has grouped together various limits or restrictions on the right of ownership. This is the chapter that contains the old servitudes "arising from the position of the property or established by law". The word "servitude" of course refers to a charge imposed on one property for the benefit of another. This suggests that the legislature intended to dissociate these limits from the rules of civil liability and attach them instead to a rule creating a real right that, in itself, is unrelated to the concept of fault. The source of the right established in this article seems to lie in the balance between the use of one property and the use of neighbouring properties, and the right therefore resembles a legal servitude that results from the human environment of a given property. [para. 40]

73 Next, it must be remembered that the actual words of art. 976 C.C.Q. do not require evidence [page430] of wrongful conduct to establish the liability of an owner who has caused excessive neighbourhood annoyances (see, *inter alia*, *Gourdeau*, at para. 39; Baudouin and Deslauriers, at p. 202). Moreover, the commentaries of the Civil Code Revision Office and the Minister of Justice support a conclusion that the legislature's intention was not to limit actions relating to neighbourhood disturbances to cases involving the wrongful exercise of a right.

74 In addition, art. 976 C.C.Q. is related to other provisions that appear to be based on the same principles regarding the exercise of rights of ownership. For example, arts. 988 and 991 C.C.Q. -- which govern the rights and obligations of neighbours -- support the argument that an owner can be found liable even though he or she has committed no fault (Lafond, at p. 455). These provisions focus on the result of an act, not on an owner's conduct.

75 In short, although they do not rule out the possibility of actions based on the usual principles of civil liability, the legislative history, the case law and academic commentaries favour the recognition of a scheme of civil liability based on the existence of abnormal neighbourhood disturbances that does not require proven or presumed fault. Such a scheme is also consistent with the approaches taken in Canadian common law and in French civil law, and with general policy considerations.

(4) Comparative Review of Canadian Common Law and French Civil Law

76 At this stage in our analysis of liability in respect of neighbourhood disturbances, we believe it will be helpful to consider how certain other legal systems approach the same kinds of problems. We will therefore briefly review the solutions adopted in Canadian common law and French civil law.

77 At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct (A. M. Linden and [page431] B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 559; L. N. Klar, *Tort Law* (2nd ed. 1996), at p. 535). Nuisance is defined as unreasonable interference with the use of land (Linden and Feldthusen, at p. 559; Klar, at p. 535). Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance (Linden and Feldthusen, at p. 559). The interference must be intolerable to an ordinary person (p. 568). This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity (p. 569). The interference must be substantial, which means that compensation will not be awarded for trivial annoyances (Linden and Feldthusen, at p. 569; Klar, at p. 536).

78 In France, the Court of Cassation accepts as a principle of law that [TRANSLATION] "no one may cause an abnormal neighbourhood disturbance to another" (J. Carbonnier, *Droit civil* (2004), vol. II, at p. 1785; P. Malinvaud, *Droit des obligations* (8th ed. 2003), at p. 404; Viney and Jourdain, at pp. 1069-70). This principle is not based on art. 1382 of the French Civil Code (Malinvaud, at p. 404; Viney and Jourdain, at p. 1069). Liability for damage resulting from abnormal neighbourhood disturbances is thus independent of fault, and a finding of excessive injury or abnormal disturbance is all that is needed to trigger it (Viney and Jourdain, at pp. 1069 and 1079). However, trivial annoyances caused by relations between neighbours will not trigger liability (Starck, Roland and Boyer, at p. 169).

79 Thus, in both these legal systems, a scheme of no-fault liability in respect of neighbourhood disturbances is accepted in one form or another. Their schemes seem analogous to the one that can be inferred from art. 976 C.C.Q.

(5) General Policy Considerations

80 Finally, it must be mentioned that the acceptance of no-fault liability furthers environmental protection objectives. The Minister stressed the [page432] importance of the environment and the quality of life in his commentaries on the chapter concerning the ownership of immovables (*Commentaires du ministre de la Justice*, vol. I, at p. 570). No-fault liability also reinforces the application of the polluter-pay principle, which this Court discussed in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, 2003 SCC 58:

To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities. [para. 24]

(6) Rejection of Real Liability

81 At this point, we must explain why it is necessary to reject the theory of real liability adopted by the Court of Appeal. According to this theory, which was not discussed or contemplated in the documented preparatory work for the Civil Code, the obligation not to injure one's neighbours must be treated as a

charge on every immovable in favour of neighbouring lands, and the rights and obligations associated with good neighbourliness are dependent on land ownership:

[TRANSLATION] Since only a person who has a right of ownership has an obligation of good neighbourliness, the obligation becomes a charge for that person, that is, a real obligation, since it imposes certain limits on the exercise of his or her right.

(L. Laflamme, "Les rapports de voisinage expliqués par l'obligation *propter rem*", in S. Normand, ed., *Mélanges offerts au professeur François Frenette: Études portant sur le droit patrimonial* (2006), 229, at pp. 233-34)

According to the theory of real liability, the obligation not to impose abnormal annoyances on a neighbour is inherent in the right of ownership. As soon as the limit of "normal" annoyances is exceeded, the neighbouring owner can set up his or [page433] her right against the owner who is at fault by bringing an immovable real action to put an end to the disturbance. As for claims for compensation of a personal nature, the Court of Appeal suggested that they should be governed by the traditional rules of civil liability, which require proof of wrongful conduct by the neighbouring owner (para. 175).

82 The approach adopted by the Court of Appeal raises several problems. The fact remains that, in principle, as Professor Lafond points out, behind any real obligation is a [TRANSLATION] "person who is the debtor of the charge" and must compensate a neighbour who suffers excessive annoyances (Lafond, at p. 455; see also Popovici, at p. 225). Thus, the remedy under art. 976 C.C.Q. remains first and foremost a claim that a person (and not land) has against another person, as the Court of Appeal held in *Gourdeau* in allowing the action for demolition brought by the appellants, who were the owners of the neighbouring property. Furthermore, the Court of Appeal's approach would significantly restrict and limit the scope of art. 976 C.C.Q. Under this approach, only an immovable real action would be possible even though a person, and not land, actually suffers the annoyances and claims compensation.

83 The Court of Appeal's approach would also mean that a remedy under art. 976 C.C.Q. would not be available to lessees or occupants, since they would not be able to claim to have a real right. Yet the courts have already found that lessees, too, may benefit from this scheme even though they do not have such a right. One author points out that no court has yet held an action under art. 976 C.C.Q. to be inadmissible [TRANSLATION] "on the basis that it was brought by someone other than the holder of a right of ownership" (Laflamme, at p. 232). Indeed, it seems incongruous to tie the right to enjoy a neighbourhood without excessive disturbances solely to status as an owner even though the damage is suffered by the plaintiff, not the plaintiff's property. On that basis, the Superior Court has held that the term "neighbour" refers not only to the holder of a real right in land, but also to any person [page434] who exercises a right to enjoy or use land (*St-Pierre v. Daigle*, [2007] Q.J. No. 1275 (QL), 2007 QCCS 705, at para. 19; *Coalition pour la protection de l'environnement du parc linéaire "Petit Train du Nord" v. Laurentides (Municipalité régionale de Comté des)*, [2005] R.J.Q. 116, at para. 100, main appeal and incidental appeal dismissed on motions, [2005] Q.J. No. 9042 (QL), 2005 QCCA 664).

84 Moreover, the narrow approach adopted by the Court of Appeal would make it difficult, if not impossible, to institute class actions in situations where art. 976 C.C.Q. applies. In addition to limiting this provision to purely real rights, the Court of Appeal used this characterization to conclude that class actions are precluded because, in its opinion, the class action procedure is reserved exclusively for the exercise of rights belonging to persons (C.A., at para. 178; see also the criticisms by Lafond, at pp. 454-

55). This position contradicts a number of judgments in which the courts have authorized class actions where the plaintiff members held real rights and were claiming damages (K. Delaney-Beausoleil, "Livre IX: Le recours collectif", in D. Ferland and B. Émery, eds., *Précis de procédure civile du Québec* (4th ed. 2003), vol. 2, 875, at p. 906; see *Dicaire v. Chambly (Ville)*, [2000] Q.J. No. 884 (QL) (C.A.); *Bouchard v. Corp. Stone Consolidated*, [1997] Q.J. No. 4574 (QL) (Sup. Ct.); and *Arseneault v. Société immobilière du Québec*, [1997] Q.J. No. 4570 (QL) (Sup. Ct.)).

85 We will not comment further on the theory of real liability, which appears to us to unduly limit the scope of art. 976 C.C.Q. and the possibility of instituting a class action.

(7) Conclusion

86 Even though it appears to be absolute, the right of ownership has limits. Article 976 C.C.Q. establishes one such limit in prohibiting owners of land from forcing their neighbours to suffer [page435] abnormal or excessive annoyances. This limit relates to the *result* of the owner's act rather than to the owner's *conduct*. It can therefore be said that in Quebec civil law, there is, in respect of neighbourhood disturbances, a no-fault liability regime based on art. 976 C.C.Q. which does not require recourse to the concept of abuse of rights or to the general rules of civil liability. With this form of liability, a fair balance is struck between the rights of owners or occupants of neighbouring lands.

E. *Application of the Principles of Civil Liability to the Facts of This Case*

(1) Review of the Superior Court's Findings

87 The question of the effect of environmental standards or standards for operating the cement plant and their impact on SLC's civil liability arose in the Superior Court. There were several environmental standards that applied to SLC, and all of them limited its right of ownership. First of all, SLC had to comply with the *Regulation respecting the quality of the atmosphere*, R.R.Q. 1981, c. Q-2, r. 20, which establishes opacity standards to be met by a business when discharging contaminants into the atmosphere (ss. 10 and 11), and standards for the emission of particulate matters into the atmosphere by a cement plant (s. 42). As well, the *Regulation respecting the application of the Environment Quality Act*, (1993) 125 G.O. II, 5997 ("RAEQA"), provides that "[a]ny equipment used or installed for the purpose of reducing the emission ... of contaminants into the environment shall at all times be in good working order and shall function optimally during production hours" (s. 12). SLC was also subject to standards for blasting in quarries (*Regulation respecting pits and quarries*, R.R.Q. 1981, c. Q-2, r. 2, s. 34). Finally, the *SLC Special Act* required it to "use the best known means to eliminate dust and smoke":

[page436]

5. The corporation shall favour local labour first and regional labour afterwards, save as regards administrative employees, technicians and experts, and shall pay reasonable wages, procure suitable working conditions, maintain hygienic and sanitary conditions conducive to public health and safety and use the best known means to eliminate dust and smoke.

88 SLC's cement mills were equipped with bag filters. According to the evidence, if a filter of this type is in good condition, the air coming out of it will remain relatively clean, with no cloud of smoke (Sup. Ct., at para. 241). The evidence also showed that the electrostatic precipitators used with SLC's equipment were efficient but fragile and that to function properly, they required regular maintenance (para. 242).

89 The tests conducted on the chimneys of the kilns and clinker coolers (the two main sources of particulate matter emissions) showed that, at the time of the tests, the standards for emissions of particulate matters into the atmosphere were being complied with. Although this did not prove that these standards were always met at other times, Dutil J. noted that there was no evidence on this point (para. 238).

90 Dutil J. nonetheless acknowledged that the evidence showed that many incidents had occurred as of June 4, 1991. She referred to the environmental incident reports completed at the plant between February 6, 1992 and May 16, 1996 and to documents from the Ministère de l'Environnement prepared between June 8, 1991 and February 1, 1996, which contained notes taken by government officials during telephone calls or meetings with SLC representatives or concerning complaints received from citizens (paras. 244-45). The judge also noted that clouds of dust coming from hatches or windows on the east side of the plant (where the cement mills were located) were visible on videotapes recorded by a resident between 1992 and 1997, and SLC did not deny this (para. 240). The videotapes also showed dust at the base of the chimney for the kilns, which [page437] were equipped with electrostatic precipitators (para. 242).

91 Although Dutil J. observed that there had been frequent deposits of dust and flakes (para. 246), she stated that the evidence did not make it possible to attribute them to a failure to maintain the plant's equipment (para. 255). Dutil J. noted that SLC had hired an environmental manager, invested several million dollars on projects relating to environmental protection, used the best dust control systems available for wet process kilns (paras. 256-58) and hired a maintenance team that was responsible for keeping the equipment in good working order (para. 263). She therefore refused to find fault on SLC's part on the basis of a presumption of fact:

[TRANSLATION] In the Court's opinion, the plaintiffs have not shown that the defendant committed faults by failing to comply with section 12 of the *Regulation respecting the application of the Environment Quality Act*, which concerns the maintenance of its equipment. To find the defendant liable on the basis of presumptions of fact, the presumptions must be serious, precise and concordant. [para. 252]

92 Dutil J. added that SLC had fulfilled its obligation under s. 5 of the *SLC Special Act* to use the best known means to eliminate dust and smoke (para. 264).

(2) Absence of Fault, Including Fault Related to the Violation of Statutory Obligations

93 In this context, the Superior Court had to consider whether SLC had committed a civil fault in relation to its statutory obligations. In analysing s. 12 *RAEQA* from the standpoint of a failure by SLC to maintain its equipment, Dutil J. was attempting, without expressly saying so, to determine whether SLC had taken reasonable precautions to ensure that its equipment was in good working order at all times and was functioning optimally, and whether its conduct in this regard may have constituted wrongdoing that would justify a finding of civil fault.

[page438]

94 As we mentioned above, Dutil J. appears to have concluded that the respondents had failed to prove fault and that she could not draw presumptions of fact about the appellant's liability from the evidence.

Her interpretation of the facts is reasonable, and her analysis of the law is correct. The respondents have not shown that the Superior Court judge made an error in this regard that justified the Court of Appeal intervening to reverse her decision. Section 12 *RAEQA* does inform the interpretation of the applicable standard of conduct, but without a finding that this standard has not been met, we must confine ourselves to no-fault liability in respect of neighbourhood disturbances.

(3) Finding of No-Fault Liability Under Art. 976 C.C.Q.

95 After hearing the evidence, Dutil J. said she was convinced that, even though SLC had operated its plant in compliance with the applicable standards, the representatives and members of the group had suffered abnormal annoyances that were beyond the limit of tolerance neighbours owe each other according to the nature or location of their land (para. 304). First, clinker dust or cement dust had caused the most serious annoyances in all the zones she had identified, namely the red, blue, yellow and purple zones. Because of the dust deposits, many residents had to wash their cars, windows and garden furniture frequently and could not enjoy their property. This led to considerable annoyances associated with maintenance and painting and with the use of outdoor spaces (paras. 305 *et seq.*). As well, sulphur, smoke and cement odours caused abnormal annoyances in all zones except the purple zone (paras. 323 *et seq.*). Finally, the noise from the cement plant's operation caused annoyances that were beyond the limit of tolerance in the red zone and, to a lesser extent, in the blue zone (paras. 328 *et seq.*). In view of Dutil J.'s findings of fact, it seems clear to us that the group members suffered abnormal annoyances that varied in their intensity but were beyond the limit of tolerance neighbours owe each other. The [page439] trial judge was therefore justified in finding SLC liable under art. 976 C.C.Q.

96 We note in closing that Dutil J. did not misinterpret the word "neighbour" as used in art. 976 C.C.Q. when she concluded that all members living in the neighbourhoods adjacent to the plant were neighbours of the plant for the purposes of that provision on the basis that they lived close enough to it (paras. 354-59). Article 976 C.C.Q. does not define the scope of the concept of "neighbour". Obviously, the plaintiff must prove a certain geographic proximity between the annoyance and its source. However, the word must be construed liberally. The leading case on this point, which dates back to 1975, is *Carey Canadian Mines Ltd. v. Plante*, [1975] C.A. 893. In that case, the plaintiff claimed damages from Carey Canadian Mines after a river crossing his land became polluted; the evidence showed that the pollution came from an asbestos deposit two miles away. The Quebec Court of Appeal confirmed that the obligation extended to the entire neighbourhood and that the properties concerned did not have to be adjacent (p. 899; see also *Théâtre du Bois de Coulonge inc. v. Société nationale des québécois et des québécoises de la Capitale inc.*, [1993] R.R.A. 41 (Sup. Ct.), at pp. 42-43; *Ouimette v. Canada (Procureur général)*, [2002] R.J.Q. 1228 (C.A.), at p. 1244). The conditions for finding SLC liable under art. 976 C.C.Q. were therefore met. However, SLC has raised other defences to avoid or limit its civil liability that must now be considered.

F. *SLC Special Act and the Immunity Argument*

97 First, SLC argues that as a result of the *SLC Special Act* passed by the Quebec legislature in 1952 to govern its activities, it has immunity from actions in damages relating to its industrial activities. In its view, this immunity results from the rule [page440] that a person or a corporation may not be held liable in nuisance if the activity in question is authorized by statute and it is proved that the nuisance is the inevitable result or consequence of exercising that authority. According to SLC, although this rule derives from English law (*Allen v. Gulf Oil Refining Ltd.*, [1981] 1 All E.R. 353 (H.L.); *Manchester Corporation v. Farnworth*, [1930] A.C. 171 (H.L.); *Hammersmith and City Railway Co. v. Brand* (1869), L.R. 4 H.L.

171), it is recognized in Canadian common law (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181) and is also applicable in Quebec law (*Canadian Pacific Railway Co. v. Roy*, [1902] A.C. 220 (P.C.); *Ouimette*; *Laforest v. Ciments du St-Laurent*, [1974] C.S. 289).

98 The statute relied on by SLC provides no basis for this defence. Although the *SLC Special Act* authorized the operation of the plant while requiring that the best means available be used, it in no way exempted SLC from the application of the ordinary law. When the legislature excludes the application of the ordinary law, it generally does so expressly. For example, the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001, provides that "[n]o worker who has suffered an employment injury may institute a civil liability action against his employer by reason of his employment injury" (s. 438). Likewise, with regard to bodily injury, the *Automobile Insurance Act*, R.S.Q., c. A-25, provides that "[c]ompensation under this title stands in lieu of all rights and remedies by reason of bodily injury and no action in that respect shall be admitted before any court of justice" (s. 83.57). There is no provision in the *SLC Special Act* precise enough to justify a conclusion that the law of civil liability has been excluded for all consequences of the plant's activities.

G. Prescription and Future Damage

99 SLC also makes an argument based on prescription. According to this argument, prescription [page441] was not interrupted for damage relating to events subsequent to the judgment authorizing the class action, and the action is thus prescribed as regards such events. It must therefore be determined whether events subsequent to the filing of the application for authorization to institute a class action are relevant to this case, and whether the representatives can be compensated for damage suffered after that date.

100 Article 2908 C.C.Q. restates the principle set out in art. 2233a C.C.L.C. that an application for leave to bring a class action suspends prescription until the judgment granting the motion is no longer susceptible of appeal:

2908. A motion for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the motion.

The suspension lasts until the motion is dismissed or annulled or until the judgment granting the motion is set aside; ...

In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.

(See *Commentaires du ministre de la Justice*, vol. II, at pp. 1824-25.)

101 In the instant case, the action was authorized on March 31, 1994 by Thibault J. Prescription was therefore *suspended* between the date of the application, June 4, 1993, and the date when Thibault J.'s judgment was no longer susceptible of appeal, namely 30 days after March 31, 1994 (art. 494 C.C.P.). Prescription then ran again until the action was filed on August 1, 1994. The *Civil Code of Québec* provides that the filing of a judicial demand *interrupts* prescription:

2892. The filing of a judicial demand before the expiry of the prescriptive period constitutes a civil interruption, provided the demand is served on the person to be prevented from prescribing not later than sixty days following the expiry of the prescriptive period.

102 Article 2896 *C.C.Q.* adds that the interruption continues until judgment and has effect in respect of any right arising from the *same source*:

[page442]

2896. An interruption resulting from a judicial demand continues until the judgment acquires the authority of a final judgment (*res judicata*) or, as the case may be, until a transaction is agreed between the parties.

The interruption has effect with regard to all the parties in respect of any right arising from the same source.

The question is therefore whether the damage suffered by the representatives after the filing of the judicial demand in August 1994 arose from the "same source". The analysis on this point will make it possible to decide whether the representatives can be compensated not only for neighbourhood disturbances that occurred between June 4, 1991 and the date of filing of the demand, June 4, 1993, but also for damage suffered up to the time SLC ceased operations in 1997.

103 In this case, the courts below correctly adopted a liberal interpretation of the words "same source". Dutil J. held that the *Civil Code of Québec* does not limit the general scope of the word "source" in art. 2896 *C.C.Q.* (para. 223) and concluded that it is possible to claim compensation for damage that has the same cause but is spread out over time. Moreover, in her judgment authorizing the class action, Thibault J. did not limit the members' claims to the period starting on June 4, 1991 and ending with the filing of the motion for authorization on June 4, 1993. The Court of Appeal confirmed the validity of Dutil J.'s liberal interpretation of the expression "same source" (paras. 224-25).

104 The Court of Appeal had also concluded in *ABB Inc. v. Domtar Inc.*, [2005] R.J.Q. 2267, 2005 QCCA 733, that the word "source" must be interpreted broadly rather than narrowly. The following passage shows that that court's decisions have been consistent. The provision's purpose is to maintain, not to extinguish, rights associated with proceedings that are under way:

[page443]

[TRANSLATION] In *Québec (Procureur général) v. Armand Sicotte & Fils Ltée* [[1987] R.R.A. 290, at p. 294], this court stated:

Article 2224 *C.C.L.C.* provides that the filing of a judicial demand creates a civil interruption that is effective for every party to the action for any right and recourse arising from the same source as the demand... .

Later, in *D'Anjou v. Thériault* [C.A., Montréal, 200-09-002267-984, 2001-05-01], this court held that:

[44] This conclusion is made all the more necessary by the need to bear in mind the legislature's purpose in making successive amendments to art. 2224 *C.C.L.C.* In my opinion, that purpose was a liberal one, namely to ensure that rights closely connected with legal

proceedings already under way would be maintained rather than extinguished. Naturally, this objective required a flexible interpretation of the criterion of identity of sources, which this Court adopted, *inter alia*, in *Banque de Nouvelle-Écosse v. Exarhos ...* . [Emphasis deleted; paras. 96-97.]

105 Baudouin and Deslauriers also discuss the concept of "continuing damage and its consequences for prescription". This type of damage involves an injury that recurs or persists over time. In such a case, it makes sense to allow the victim to bring a single action to put a permanent end to the damage rather than requiring him or her to bring a series of actions.

[TRANSLATION] **1-1422** -- *Continuing damage* -- This is a single injury that persists rather than occurring just once, generally because the fault of the person who causes it is also spread over time. One example is a polluter whose conduct causes the victim an injury that is renewed every day... . Since there are several wrongful acts as well as simultaneous recurring damage that is related to those acts, it makes sense to accept, as the courts do, that prescription starts running each day... . The plaintiff thus has the option of either suing once and for all and seeking an end to the injury or compensation for future damage, or periodically renewing his or her judicial demands. [pp. 1200-1201]

Although Baudouin and Deslauriers are referring to a more typical situation involving extracontractual [page444] liability (where fault has been proved), their analysis relates mainly to the question of damage. It therefore applies even in the present context where the defendant's liability is based on the extent of the annoyances suffered by the victims rather than on fault.

106 Here, the "source" of the continuing damage suffered by the representatives, namely the acts that generated their right of action, remains the same: activities of SLC that caused excessive neighbourhood annoyances. Since those activities continued until 1997, it would make no sense (in addition to being impractical, as Dutil J. pointed out at para. 230) to ask the group's representatives to repeat their motion every three years for each annoyance suffered. In conclusion, we agree with the courts below that all events subsequent to the filing of the action were relevant, and in our opinion, they did not err in law or in fact in this regard.

H. *Appropriateness of Using Average Amounts in Assessing Damages*

107 SLC criticizes the method chosen by the courts below respecting compensation: determining an "average" for each of the residential zones that had been established rather than making an order requiring each resident to prove his or her injury. The representatives contest the intervention of the Court of Appeal, which reduced the compensation awarded by Dutil J. They ask that the Superior Court's conclusions on the quantum of damages be restored.

108 A distinction must be drawn between *evidence* of similar injury and the *assessment* of that injury. On the question of evidence, this Court stated in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, that "in the context of an action in civil liability brought in the form of a class action, the elements of fault, prejudice and causal connection [page445] must be established in respect of the members of the group, by the normal evidentiary rules" (para. 33). L'Heureux-Dubé J., writing for the Court, noted that the rules of proof by presumptions apply to class

actions (para. 39) and that presumptions of fact can be used to prove that a similar injury has been suffered:

In my opinion, Nichols J.A. correctly described the process followed by the trial judge (at p. 2784):

[TRANSLATION] When the trial judge spoke of a "presumption of similarity", he did not use a presumption of law but rather looked at it as an objective toward which his analysis of the evidence was leading. He never drew the conclusion that all the patients had suffered the same prejudice because the representative of the group had herself suffered discomfort. *Rather, he sought to find an element of damage common to everyone, and only after reviewing the evidence as a whole did he find enough evidence to be able to infer that there were serious, precise and concordant presumptions that all the patients had at least suffered discomfort.*

If we consider that no member of the group was capable here of expressing himself or herself to describe the subjective prejudice he or she felt, the necessary conclusion is that, in the circumstances, proof by presumptions was the most appropriate method of proof for establishing the existence of such prejudice.

I agree with Nichols J.A. on this point and I would add that the trial judge did not rely solely on presumptions of fact, but also took into account the evidence as a whole, including that of witnesses and expert witnesses, in reaching his conclusions. [Emphasis added by L'Heureux-Dubé J.; paras. 41-42.]

Therefore, the court can draw from the evidence a presumption of fact that the members of the group have suffered a similar injury (J.-C. Royer, *La preuve civile* (3rd ed. 2003), at p. 649). It may also divide the group into subgroups, each of them made up of members who have suffered a similar injury.

109 At the hearing in the instant case, 62 witnesses residing in the four zones described the annoyances they had suffered (Sup. Ct., at paras. 23-24). Relying on their testimony, Dutil J. found [page446] that the evidence showed a form of injury that was common to all members of the group, but that varied in intensity (para. 398). Dust emissions, odours and noise from the plant had affected the residents of some zones less than others. For this reason, Dutil J. divided the group members into four zones to ensure that there was some basic injury common to the residents of each zone. She thus ensured that there was a common injury in each zone.

110 It is true that in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, this Court expressed the opinion that the class action was not the preferable means of resolving the claims of the class members. However, in that case, the Divisional Court had noted that "[e]ven if one considers only the 150 persons who made complaints -- those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (para. 32). In the instant case, the representatives provided detailed evidence of the injury they had suffered. Dutil J. considered all that evidence and was able to infer from it that the members in each zone had suffered similar injuries. Her analysis contains no error warranting this Court's intervention.

111 However, one aspect of Dutil J.'s decision is unusual: she ordered that recovery be subject to an individual claims procedure but assessed the amount to be awarded to each member using an average determined for each zone. The procedure chosen for recovery should not be confused with the assessment

of injury. From a procedural standpoint, the trial judge must decide whether "the claims of the members [will] be recovered collectively or be the object of individual claims" (art. 1028 C.C.P.). Regardless of whether recovery is collective or individual, each member will, in theory, be compensated for "the amount of the loss he has sustained and the profit of which he has been deprived" (art. 1611 C.C.Q.). This is because a class action is only a "procedure which enables one member to sue without a mandate on behalf [page447] of all the members" (art. 999(d) C.C.P.; see *Dell Computer*, at paras. 105-8). The nature of the action itself remains unchanged. Thus, even in the context of an order for collective recovery, the injury the trial judge must assess is, at first glance, individual rather than common.

112 The provisions of the *Code of Civil Procedure* on individual claims do not suggest that the trial judge may not decide the amount to be awarded in respect of an individual injury (see arts. 1037 to 1040 C.C.P.). Moreover, a judge who opts for collective recovery does so "if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; [the judge] then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established" (art. 1031 C.C.P.). This suggests that the total amount is based on an assessment of the sum of the members' individual injuries. Finally, the trial judge has considerable discretion in making this assessment in the context of a class action (arts. 1039 and 1045 C.C.P.; see also *Thompson v. Masson*, [2000] R.J.D.T. 1548 (C.A.), at paras. 38-40).

113 Professor Lafond makes the following comment about the trial judge's discretion:

[TRANSLATION] In a class action, the judge has a different role, as his or her participation continues until the final judgment is executed. The collective or individual processing of claims and the distribution of compensation constitute an essential step in the class action and largely determine the effectiveness of the procedure. The legislature has assigned responsibility for this to the judge, who turns into a genuine administrator for purposes of the execution of his or her decision.

(*Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution* (2006), at p. 189)

Thus, a trial judge who, as in the case at bar, decides to proceed by way of individual claims is not precluded from determining the amount to be awarded in respect of an individual injury. This approach [page448] also simplifies the individual claims procedure, since it will then be possible to limit what must be proved at that stage.

114 The question that remains is whether it was appropriate for Dutil J. to use average amounts to determine the compensation in this case. It must be recognized that the annoyances suffered by victims of environmental injury are difficult to assess. In *Domfer*, 4,000 residents of Ville-Émard suffered damage and annoyances caused mainly by dust, noise and odours from Domfer's plants. Forget J.A. rightly noted that it was difficult to put a dollar amount on the problems and annoyances the residents had suffered (para. 162). In that case, too, the Court of Appeal used average amounts and based the plaintiffs' compensation on the zones in which they resided, although its reasoning was grounded in fault-based liability (para. 164). Thus, the Court of Appeal's approach was analogous to the one taken by Dutil J. in the instant case.

115 An average amount was also used to determine compensation for moral injury in *St-Ferdinand*. In

that case, the trial judge had expressed the opinion that [TRANSLATION] "[w]here all members of the group have suffered the same kind of prejudice, the prejudice can be assessed on the basis of an average without increasing the debtor's liability" ([1990] R.J.Q. 359, at p. 397). L'Heureux-Dubé J., writing for this Court, noted that "because of the nature of the prejudice, the quantum of moral damages cannot be determined exactly" (para. 85).

116 Given the trial judge's discretion and the difficulty of assessing environmental problems and annoyances, we consider Dutil J.'s use of average amounts to have been reasonable and appropriate in the circumstances. Moreover, SLC has not shown that its liability increased as a result. There is no indication that the amount awarded by Dutil J. was based on a wholly erroneous estimate of the injury (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 235). We will therefore allow the cross-appeal and restore the Superior [page449] Court's conclusions on the assessment of damages (with the exception of para. 419, corrected by the Court of Appeal with the respondents' agreement), which the Court of Appeal varied because of its findings concerning the bases for SLC's liability.

117 Moreover, it is our view that the amount awarded by Dutil J. to the owners for additional painting expenses should also be restored. In light of the evidence before the court, we are not convinced that that assessment was inconsistent with the latitude the trial judge is recognized to have. Dutil J. gave a precise description of the additional painting expenses incurred by Claude Cochrane, one of the representatives, who lived in the red zone (paras. 57-60). She subsequently noted that another witness from the red zone had painted every year until he moved in 1994 (para. 78); that house exteriors had had to be repainted regularly in the yellow zone (para. 94); that lessees in the purple zone had not referred to painting in their testimony (para. 101); that two owners from the purple zone had said they had to paint wooden window frames every two years (para. 102); and that many witnesses had confirmed that after the plant closed, they no longer had to paint every year or two (para. 313). Dutil J. also distinguished environmental problems and annoyances from injury in the form of painting expenses (paras. 312-13).

118 The test to be applied by an appellate court before intervening with respect to the quantum of damages is "very strict and gives preference to the evaluation done by the trier of fact" (*St-Ferdinand* (S.C.C.), at para. 84). It is our opinion that SLC has not proved that Dutil J. applied a wrong principle of law or that the amount she awarded to the owners was based on a wholly erroneous estimate of the injury. That amount should therefore be restored.

[page450]

III. Disposition

119 For these reasons, we would dismiss the appeal and allow the cross-appeal, with costs throughout.

Solicitors

Solicitors for the appellant/respondent on cross-appeal: Ogilvy Renault, Montréal.

Solicitor for the respondents/appellants on cross-appeal: Jacques Larochelle, Québec.

Solicitors for the interveners Friends of the Earth and Quebec Environmental Law Centre: Lauzon Bélanger, Montréal; uOttawa-Ecojustice Environmental Law Clinic, Ottawa.

Solicitors for the intervener Quebec Business Council on the Environment: Davies Ward Phillips & Vineberg, Montréal.

Teal Cedar Products Ltd. v. Rainforest Flying Squad

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

L.A. Fenlon, G.B. Butler and J. DeWitt-Van Oosten JJ.A.

Heard: November 15-16, 2021.

Judgment: January 26, 2022.

Docket: CA47775

[2022] B.C.J. No. 115 | 2022 BCCA 26

Between Teal Cedar Products Ltd., Appellant (Plaintiff), and Unknown Persons operating as the "Rainforest Flying Squad", Robert Arbess (also known as Reuben Garbanzo), John Doe, Jane Doe, and Persons Unknown, Respondents (Defendants), and British Columbia (Ministry of Forests, Lands, Natural Resource, Operations and Rural Development), Respondent (Third Party), and Members of the "Rainforest Flying Squad", Kathleen Code, Carole Toothill, William Jones, Keith Cherry, Rani Earnhart, Saul Arbess, Warren Kimmitt, Donna Clark, and Attorney General of Canada, Respondents, and Huu-ay-aht First Nations, Intervenor

(82 paras.)

Case Summary

Court Summary:

The appellant appeals from an order refusing to extend an injunction restraining the conduct of protesters interfering in the appellant's logging operations. The chambers judge found that the absence of an enforcement gap (given the probable use of the criminal law) diminished the weight to be given to the public interest in upholding the rule of law by enjoining the protesters from engaging in unlawful activity. The judge concluded that the balance of convenience lay in denying an extension of the injunction taking into account the countervailing public interest in protecting the reputation of the court from depreciation through being pulled into the dispute and by being associated with the manner in which police were enforcing the injunction. The appellant contends on appeal that the judge erred in using an enforcement gap analysis, in his conclusion that the reputation of the court would be diminished by continuing the injunction, and in his weighing of the public interest in upholding the rule of law.

Held: Appeal allowed. The availability of the criminal law is not a factor weighing against the granting or extension of a civil injunction to a private entity. The court's reputation, properly characterized, is not depreciated by the grant and enforcement of an injunction to stop unlawful conduct. The conduct of police does not tarnish the reputation of the court; the court and police are constitutionally independent. The

public interest in upholding the rule of law continues to be the dominant public interest in cases involving civil disobedience against a private entity.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated September 28, 2021 (*Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2021 BCSC 1903, Vancouver Docket S211602).

Counsel

Counsel for the Appellant: D.L. Dalke, A.R. Hudson, E.J. Snow.

Counsel for the Respondent, Robert Arbess (aka Reuben Garbanzo): D.I. Turner, Q.C.

Counsel for the Respondent British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development): K.A. Reilly, D.G. Cowie.

Counsel for the Respondents, Kathleen Code, Carole Toothill and William Jones: M.B. Funt, C. Chamberlain.

Counsel for the Respondents Keith Cherry and Rani Earnhart: M. Nefstead.

Counsel for the Respondent Attorney General of Canada: T.D. Timberg, D. Nunez.

Counsel for the Intervenor Huu-ay-aht First Nations: M.M. Giltrow, N.D. Sudeyko.

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Reasons for Judgment

The following judgment was delivered by

THE COURT

1 This appeal arises from a judge's refusal to extend an interlocutory civil injunction that protected lawful logging operations from unlawful interference by protesters.

2 The case is not about the wisdom of government forest policy. It is decidedly not about the Court's views on whether and where old-growth logging should occur in this province, even in the context of climate change. In an injunction application, those are matters outside of the constitutional competence of the courts and exclusively within the constitutional purview of the government elected by the citizens of British Columbia.

3 This case is, rather, about the principles that apply when a court is asked to enjoin significant and persistent unlawful conduct by those who choose to abandon the democratic process and impose their will on others by force. That is the nature of the conduct sought to be addressed by the injunction, not peaceful protest that occurs within the law. There is a clear demarcation between the type of conduct displayed in this case and the actions of lawful protesters who use peaceful means to persuade the government to change policy.

The unlawful conduct in issue

4 The unlawfulness of the conduct Teal Cedar seeks to enjoin is not in dispute. Indeed, the respondents argue that an injunction is not needed because the conduct is criminal in nature and thus can be dealt with under the *Criminal Code*, R.S.C. 1985, c. C-46: destroying or damaging property (s. 430(1)(a)); rendering property dangerous (s. 430(1)(b)); obstructing or interfering with use of property (s. 430(1)(d)); mischief that causes actual danger to life (s. 430(2)); and blocking or obstructing a highway (s. 423(1)(g)).

5 In plain language, the conduct in issue involves protesters:

- * digging trenches in roads, sometimes at cliff edge, which impede emergency vehicles and put roads at risk of collapse. Protesters lock themselves into the bottom of trenches, some of which are up to eight feet deep; the occupants and the RCMP officers who remove them are at risk of being smothered should the trench walls fail;
- * chaining themselves into "sleeping dragon" devices, which are sometimes encased in concrete, embedded in a metal box, fortified with metal hazards, barbed wire or spikes, and filled with dry oats to prevent police use of scoping cameras;
- * constructing barricades to make the road impassable for vehicles. One barricade was covered with piles of human feces and jars of urine, which RCMP members had to remove;
- * placing objects on helicopter landing pads, which poses grave safety risks;
- * suspending themselves over roadways, and over and under bridges in devices called tripods, bipods, and cantilevers. The tripods reach heights of 30 feet, are hastily constructed and structurally unsafe. Occupiers armour the legs of their tripods with railroad spikes or chicken wire to prevent RCMP from using tools to dismantle the tripods from the bottom. Some tripod-sitters place nooses around their necks with climbing ropes, chains, and bicycle locks. One protester locked himself to a tripod with his face close to an array of nails, so the nails would injure him if an arresting officer touched him. Protesters have poured jars of urine down from atop of the tripods, to force the RCMP to leave them in place; and
- * occupying "tree sits", which are structures suspended high in trees. To extract these protesters, specialized RCMP officers must climb the trees or conduct an aerial removal using a helicopter and a line hoist apparatus. Protesters have more recently fortified the bottoms of the trees in which they sit with barbed wire or metal structures to make extraction more difficult.

6 Teal Cedar also describes harassment of its employees, incidents of vandalism and theft, and damage to safety equipment and machinery used by police to extract the protesters from tripods. It also says protesters have partially cut trees to create a risk to police in areas where they are enforcing the injunction.

7 There is no doubt that one or more of the respondents form part of a protesting group that is committed, sophisticated, and well-organized. Protesters have used social media to raise over \$1 million to date. They make use of the Internet to recruit individuals for specific tasks such as camp support, obstacle construction, transportation, and occupation of obstacles. They have a command and control network, a communication system to coordinate their activities, a transportation network, and dedicated construction areas and supply camps. They use drones to surveil the police and have used helicopters to resupply their camps. The methods used by those obstructing the roads have become more extreme over time. The police have removed 350 protesters from "sleeping dragons" and at least 100 from tripods set up in the middle of the roads.

8 These actions are intended to prevent Teal Cedar from exercising rights granted to it by the provincial government under Tree Farm Licence 46 ("TFL 46"), to log on southern Vancouver Island, including a portion of the Fairy Creek watershed.

9 The respondents began blockading roads at various locations in and around TFL 46 in August 2020, citing opposition to old-growth logging in Fairy Creek. In September 2020 the government announced a deferral of old-growth logging in nine areas throughout the province, but TFL 46 was not one of them. In June 2021 the government announced a two-year deferral of old-growth logging in the Fairy Creek watershed. Despite these changes in forest policy, the respondents' road blockages continued in order to prevent Teal Cedar from logging activities in areas that remained available to them.

10 The actions of the respondents and like-minded protesters have affected the rights of others as well. TFL 46 overlaps with the traditional territories of the Pacheedaht First Nation and the Ditidaht First Nation, both of which have consented to and support the planned logging. These Nations have asked the protesters to leave their territory, and to respect their right to decide how best to manage their resources. Those requests have not been heeded.

The history of the injunction orders

11 Justice Verhoeven granted the injunction in issue on April 1, 2021, enjoining the blockades. Appropriately, and consistent with the Supreme Court of Canada's endorsement of the practice in *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 at para. 41 [*Simpson*], he included enforcement terms authorizing the police to arrest and remove people who breach the injunction. When Teal's application for the injunction came before him in March 2021, the protesters had created eight blockades at various locations throughout TFL 46 and adjacent access roads: 2021 BCSC 605 at para. 25. Some of the blockades had remained in place for many months.

12 Verhoeven J. concluded Teal would suffer irreparable harm if the injunction was not granted, saying:
 [38] Teal employs approximately 450 people within its processing and manufacturing facilities. If Teal is unable to log within the area of TFL 46, it will not have an adequate timber supply for its mills. It may be forced to shut down its mills, resulting in layoffs of employees, and Teal's inability to supply its customers. Teal estimates that the end product value of the products that it will produce from the timber sourced from TFL 46 is approximately \$20 million. Teal stands to lose market share, and to suffer damage to its reputation as a reliable supplier of its products.

...

[40] The blockades have prevented Teal's road contractor, Stone Pacific, from winterizing logging roads located in steep mountainous terrain, which is necessary to prevent road washouts, erosion, and environmental damage. Some of the protestors' activities have caused safety risks. Some protestors have ignored signage and entered active work areas while blasting and other construction work is taking place. They have left fires unattended in dry conditions. Some of Stone Pacific's equipment has been vandalized. They have not kept a safe distance away from Stone Pacific's trucks. A female Stone Pacific truck driver was harassed and intimidated by a protestor named Hans on December 17, 2020. The incident was reported to the RCMP.

[41] The losses extend to Teal's contractors and their employees. Stone Pacific lost \$3,500 per day for each day its operations were prevented, and its employees lost wages of \$350 to \$400 each for every day of work lost.

13 By May 2021 the proceedings had been assigned to the judge below to case manage. Police had begun enforcement operations in mid-May 2021 and hundreds had been arrested for allegedly violating the injunction order. Some had been released with a warning. Some had been released after entering into a police-issued undertaking that included promises to appear in court and not to return to the injunction area. Those who had refused to sign the police undertakings had been brought before judges of the court and released on terms considered appropriate in the circumstances. The judge concluded that the BC Prosecution Service should be invited to assume conduct of contempt proceedings against those protesters who refused to comply with the terms of the injunction order. In doing so, he noted that there was in the case before him an "important public interest in fostering respect for the rule of law, including the ability of courts to enforce their processes and maintain their dignity and respect": 2021 BCSC 1380 at para. 16 [*Conduct of Prosecution Reasons*].

14 The matter came before the judge again on July 14-15, 2021 when a consortium of media organizations and two respondents, Saul Arbess and Susan Gage, applied to limit the RCMP's access to TFL 46, use of checkpoints, and large exclusion zones. In reasons indexed at 2021 BCSC 1554 [*Variation Reasons*], the judge found that the RCMP had not shown that their exclusion zones and checkpoints were reasonably necessary to carry out their enforcement duties, and went beyond what was lawful under the common law "ancillary powers" doctrine.

15 The judge recognized that the exclusion zones, checkpoints, and searches were all effective rational strategies for preventing people from breaching the order, and that, if the public were allowed vehicle access, and searches were not conducted, the transport of persons inclined to breach the injunction, and transport of material to be used for this purpose, would likely accelerate. He agreed that in order to prevent escalation of injunction violations, it was difficult to conceive of effective measures short of a police blockade. But he concluded that when the order was read accurately as "arrest and remove," rather than "prevent", the police could not show that their use of geographically and temporally expansive exclusion zones and associated access checkpoints were reasonably necessary: at para. 63. He described the resulting impact on the right of citizens to be left alone, on freedom of movement, and on peaceful assembly and freedom of the press as "substantial and serious" (at para. 54), but noted it was open to the RCMP to apply to vary the order if public access to the roads in the injunction area was making the arrest and removal duty unsafe: at para. 65.

The hearing below

16 On September 14, 2021, the parties were once more before the court.

17 The RCMP took up the judge's suggestion and applied to amend the terms of the order to include more expansive measures to prevent protesters from engaging in unlawful activities. Two individuals applied to constrain the RCMP in the methods used to do extractions; other individuals sought a declaration that the RCMP's access control measures were unlawful and sought a declaration that they be found in contempt. Teal Cedar sought a one-year extension of the injunction -- the application underlying this appeal.

18 At the request of the judge, the contempt application was adjourned before the hearing. The judge heard the other three applications, but ultimately addressed only Teal Cedar's motion, concluding the others were moot given his refusal to extend the injunction.

19 The judge began his analysis by referring to the well-known three-part test governing applications for an injunction set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311:

1. Is there a serious issue to be tried?
2. Will the person applying for the injunction suffer irreparable harm if the injunction is not granted?
3. Does the balance of convenience favour granting the interlocutory injunction or denying it?

The fundamental question on both an initial application for an injunction and a request to extend is whether the granting of an injunction is just and equitable in all of the circumstances of the case.

20 The judge concluded "without hesitation" that Teal Cedar met the first two branches of the *RJR-MacDonald* test. The application to extend the injunction failed on the third branch. The judge found the balance of convenience favoured refusing the injunction given his weighing of various factors affecting the public interest. The judge squarely (and correctly) rejected the respondents' contention that the protesters' goal of protecting a rare ecosystem in the context of a climate crisis should be weighed as a public interest factor, saying:

[65] ... [T]o take account of this type of public interest would amount to contempt of constitutional constraints on judicial powers. To borrow a phrase from Justice Voith's judgment in *Cermaq*, such considerations are "not on the table."

21 In terms of "legally relevant public interest considerations" under the third branch, the judge recognized that the public interest most often considered, and weighed heavily in civil disobedience cases, is the protection of the exercise of private rights from illegal obstruction -- more succinctly described as the public interest in the rule of law: at para. 32. He observed that in many cases the importance of upholding the rule of law may be the only public interest consideration. But he found that was not so in the present case. The judge identified several countervailing public interest factors:

1. The public's *prima facie* right to access the roads in TFL 46 (at para. 32);
2. Whether public order should be maintained by enforcement of the *Criminal Code* rather than by injunction (at para. 32); and
3. The strong public interest in maintaining the court's reputation by keeping it away from the front lines of the dispute and protecting it from being tarnished by police conduct: at paras. 44, 66.

22 The judge suggested that the way to balance these public interests and the public interest in protecting persons trying to exercise a lawful interest from those using unlawful actions to stop them, is to ask whether there is an "enforcement gap." If the applicant has established that a gap exists, the scales tip towards issuing an injunction to protect the applicant; if the applicant fails to establish an enforcement gap, less weight should be given to the protection of private rights: at paras. 28, 45. In other words, the

judge concluded that if other means of stopping the unlawful conduct exist, there is less need for an injunction and less weight should be given to the fundamental concern about upholding the rule of law. The judge concluded such was the case in the matter before him, finding that the unlawful conduct could be dealt with by prosecuting the people responsible for *Criminal Code* offences, since "Parliament has spoken in clear terms about damaging, destroying, or interfering with the use of property, and about blocking or obstructing roads for the purpose of compelling others to abstain from doing what they have a lawful right to do," relying on ss. 423 and 430 of the *Criminal Code*: at para. 33.

23 The judge was, of course, being asked to extend an existing injunction. He recognized that Verhoeven J. had placed a lot of weight on the need to stop illegal interference with Teal's lawful rights "and the rule-of-law implications of allowing the illegal behaviour to continue." The judge noted that standing behind lawful rights "promotes the rule of law and is undoubtedly in the public interest", as Verhoeven J. found: at para. 50.

24 Although Verhoeven J. had not assessed the original application for an injunction using the judge's "enforcement gap" analysis, the judge inferred that Verhoeven J. must have concluded there was an enforcement gap since he said that refusing the application would leave Teal Cedar with no remedy. He assumed that the behaviour of those blocking the roads in the period leading up to the hearing before Verhoeven J. "may not have risen to the level required to make criminal charges a real prospect": at para. 51.

25 The judge's enforcement gap analysis caused him to significantly reduce the weight to be given to the "rule of law" public interest concern posed by continued illegal interference with Teal Cedar's lawful activities. But he did not take it off the scales entirely, recognizing that there was still a risk that the criminal law would not be used or would not be effective in addressing the illegal behaviour that continued to plague Teal Cedar: at para. 60.

26 Continuing with the balancing exercise, the judge noted the significant impact of the illegal activity on Teal Cedar's operations and on the First Nations who had approved the logging and stood to financially benefit from it: at paras. 61 and 62. Despite according significant weight to these considerations favouring the extension of the injunction, the judge found the following countervailing factors outweighed them:

1. Government and police could and should use provincial laws such as the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 and the criminal law, as well as lawful preventive policing measures such as patrolling the roads, to stop unlawful activity (at para. 68);
2. The court's reputation had been depreciated by the manner in which the police enforced the injunction order (at para. 69), primarily:
 - (a) The use of overly expansive exclusion zones;
 - (b) Interference with media rights to freely access TFL 46;
 - (c) Command decisions to remove individual identification of officers because of concerns about harassment on social media (at paras. 79-81); and
 - (d) Failure of command to enforce an RCMP directive not to wear "thin blue line" patches on their uniforms which "deeply offend some citizens" including some Indigenous protesters: at paras. 82-86.

The judge therefore concluded that it was not just and equitable in all the circumstances of the case to extend the injunction: at para. 89.

On Appeal

27 Teal contends the judge made three significant errors:

1. Requiring it to establish an enforcement gap and finding that a gap no longer existed;
2. Concluding that the reputation of the court would be diminished by continuing the injunction; and
3. Giving insufficient weight to the public interest in upholding the rule of law and preventing irreparable harm to Teal Cedar and others.

28 The judge's refusal to extend the injunction is discretionary and entitled to significant deference. An appellate court may only interfere if the judge erred in principle, gave no or insufficient weight to relevant considerations, considered irrelevant factors, or made a decision that is so clearly wrong as to amount to an injustice: *Barrie v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2021 BCCA 322 at para. 87.

29 We conclude, with great respect to the judge below, that these errors have been established on appeal and formed the basis of his decision. We would accordingly allow the appeal and extend the injunction.

Analysis

1. Did the judge err in conducting an enforcement gap analysis and in concluding there was no enforcement gap?

30 In our view, the judge made two errors in this part of his analysis. First, he erred in law by considering the availability of charges and prosecution for *Criminal Code* offences as a factor weighing against the granting of an injunction to a private applicant. Second, he committed a palpable and overriding error of fact by finding that the criminal law *would* be used in this case to prevent ongoing harm to Teal Cedar. The result has been to upend the law of injunctions by considering, under the third branch of the *RJR MacDonald* test, matters unrelated to the interests of the parties before the court.

a) Considering the availability of the criminal law as a factor in the balance of convenience

31 In conducting this analysis, the judge recognized that the availability of the criminal law to stop the type of conduct engaged in by the protesters was not a *bar* to the court issuing an injunction: at para. 37. That point had been settled by *Simpson*, a case arising out of similar logging protests in which injunctions had been issued and upheld by a majority of this Court.

32 At issue in *Simpson* was whether the court had *jurisdiction* to enjoin criminal conduct. Wood J.A., in dissent, was of the view that the court did not, observing that it is the function and responsibility of the Attorney General as the chief law officer to see that the criminal law is enforced: *MacMillan Bloedel Ltd. v. Simpson*, [1994] 10 W.W.R. 705, 96 B.C.L.R. (2d) 201 (C.A.) at para. 155. The Supreme Court of

Canada disagreed. McLachlin J. (as she then was) writing for the Court, observed that the Attorney General of British Columbia "had a specific policy not to lay criminal charges against environmental groups engaging in civil disobedience, but to leave it to affected parties to seek injunctive relief" (emphasis in original): *Simpson* at para. 18. Responding to Wood J.A.'s opinion that it is the responsibility of the Attorney General to enforce criminal law, she said:

35 Every citizen would endorse these words. Yet, as this case demonstrates, to state the obligation of the Attorney General is not to ensure that it will be discharged in such a way as to provide the required protection to citizens injured by the conduct of others. It is to fill this gap that the equitable remedy of injunctions -- injunctions which not only the parties but also all others must respect on peril of being found in contempt of court -- has developed.

[Emphasis added.]

33 It was on the basis of McLachlin J.'s reference to injunctions "filling the gap," that the judge concluded an important consideration in deciding whether to continue Teal Cedar's injunction was "whether the enforcement gap that existed in the *Simpson* case is present in current circumstances": at para. 38. If a gap is established, the judge concluded, then the public interest in the "need to stand against those using unlawful actions to interfere with lawful interests and thus avoid leaving the applicant without a remedy" (at para. 45) must be given greater weight than the "reputational concern about the court's legitimacy and effectiveness being compromised by being pressed to the front line" of the dispute between protesters and a logging company: at paras. 43, 44, 66. Put another way, the judge found the public interest in granting an injunction to protect legal rights should be given less weight when the criminal law could be used to stop the unlawful behaviour.

34 In our view, the enforcement gap principle applied by the judge is not consistent with *Simpson*. In that case, the Supreme Court of Canada recognized that equitable injunctions are the means by which parties who cannot enforce the criminal law obtain protection for the exercise of their lawful rights. In other words, because a private applicant cannot ensure that the police and prosecutors will initiate and pursue criminal law proceedings to provide the required protection, *there will always be a gap*, and it is for that reason that the remedy of an injunction exists. *Simpson* squarely rejected the argument that an injunction ought not to issue when the alternative remedy of the criminal law may be available, as noted by this Court in *Interfor v. Simm*, 2000 BCCA 500 at para. 21 [*Simm*] and by Vickers J. in *International Forest Products Ltd. v. Kern et. al.*, 2000 BCSC 888 at para. 30 [*Kern #1*].

35 In the present case, the judge found it was likely the criminal law would be enforced by the police and BC Prosecution Service because of the nature of the conduct in issue. However, he did not go on to examine whether that course of action, even assuming he was correct, would be effective in protecting Teal Cedar's rights. Teal's concern is to stop the unlawful activity so that it can get on with exercising its rights. As this Court observed in *Simm*, an injunction and the use of contempt powers to enforce it are a more effective, relatively expeditious remedy, devoid of the legal requirements and added process burdens of trying to enforce sections of the *Criminal Code*: at paras. 22-23.

36 An injunction, unlike the criminal law, can be tailored to the facts of a given situation. It can be time-limited, geographically limited, and varied on application. As the judge noted in an earlier ruling, it can serve a valuable educational and informational purpose, providing greater clarity to both the public and the police regarding the limits of permissible activities and police enforcement: *Variation Reasons* at

paras. 76-80. In contrast, the criminal law is a blunt instrument that moves more slowly and may be less effective in solving the immediate problem of blockades that interfere with lawful activity. For example, the injunction in this case addressed safety concerns by prohibiting protesters from coming within 50 metres of certain vehicles, equipment, and machinery. The criminal law has no equivalent in the absence of an arrest and release on conditions. The injunction also gives the RCMP authority to remove illegal blockades in a clearly delineated area and prohibits specific illegal behaviour. The *Criminal Code* provisions -- such as ss. 423(1)(g) and 430(1) -- are more equivocal.

37 The judge drew support for his approach from a long line of cases in which judges have decried the perceived failure of the police and BC Prosecution Service to fulfil their unique and independent roles in enforcing the criminal law in the face of persistent civil disobedience. However, in every one of those cases, the court determined that the injunction sought must issue because the rule of law, and fairness to the applicant, demanded no less. In short, despite judges expressing trenchant criticism of police and prosecution policies, none suggested the private applicant should be left to rely on the criminal law.

38 In *Alliford Bay Logging (Nanaimo) Ltd. v. Mychajlowycz*, 2001 BCSC 636, one of the cases cited by the judge in support of his approach, Williamson J. commented that an injunction would be unnecessary if there were no gap in criminal law enforcement, i.e., if the Attorney General ensured the effective use of criminal proceedings that would actually prevent irreparable harm. In a subsequent decision in the same proceeding, 2001 BCSC 147, Williamson J. said:

[23] Thus, when law enforcement authorities fail to protect the legal rights of litigants such as the plaintiff, the Court, if all other aspects of the requisite test for the granting of an injunction have been met, must come to the aid of the wronged party. That that is the law in this province has been settled by the Supreme Court of Canada in *MacMillan Bloedel Ltd. v. Simpson* [...]

[Emphasis added.]

39 We conclude the weight of the jurisprudence is entirely against the approach taken by the judge in the present case. The respondents could not identify a single case in which a court refused to enjoin persistent illegal interference with private rights on the basis that the applicant could not establish that the criminal law would not suffice. As the respondents candidly acknowledged on appeal, the enforcement gap principle adopted by the judge would lead inevitably to the conclusion that the more egregious the behaviour of the protesters, the less likely it is that an injunction will be granted -- a principle entirely at odds with the court's obligation to uphold the rule of law.

40 That is not to say that the availability of means other than an injunction to prevent unlawful conduct -- such as provincial statutory offences, new legislative initiatives or protective remedies, or demonstrated, consistent, and effective engagement of the criminal law in a particular scenario -- can never be relevant to the injunction analysis. If those means were being employed in a manner that caused unlawful protesters to stand down, that would be relevant to whether an applicant could establish irreparable harm. The availability of other options is particularly relevant when it is *government* seeking to obtain an injunction because it has greater ability to access and enforce alternative remedies, as in *Beaudoin v. British Columbia*, 2021 BCSC 248, *Interior Health Authority v. Statham*, 2005 BCSC 1243, and *British Columbia v. Sager*, 2004 BCSC 720. But the applicant in the present case is not a government entity. Teal Cedar, as a private entity, cannot exert any control over whether the police or BC Prosecution Service

enforce the criminal law. Nor can Teal Cedar use provincial laws to fine the protesters or legislate more effective remedies -- options described by the judge at para. 68 of his reasons.

41 The intervenor Huu-ay-aht First Nations (HFN) emphasized the difference between government applicants and others seeking an injunction. As a modern treaty nation with jurisdictional rights over resource use, HFN depends on courts to enforce its laws and uphold its rights. It cannot mobilize the criminal law or find a legislative solution to interference with its resource management decisions. HFN opposes the imposition of any additional evidentiary burden on an applicant seeking an injunction to enforce rights, such as proof that the criminal law could not be used instead -- a burden it says would make it more difficult to exercise its hard-fought treaty rights and would therefore cut against the overarching object of reconciliation.

42 We note parenthetically that the impact of the blockades on First Nations illustrates the importance of the democratic process and the rule of law. Unlike the protesters, whose single-minded goal is to end old-growth logging, the government must consider and balance many competing interests and objectives in developing forest policy and in granting or refusing licences.

b) The judge's finding that the criminal law would stop the harm

43 We turn now to the judge's conclusion that there was no need for an injunction because the criminal law would be used to put an end to the unlawful conduct of the protesters.

44 As noted above, the judge accepted that Verhoeven J. must have found an enforcement gap when he issued the injunction in April 2021, but concluded that was no longer so for two reasons. First, he thought the behaviour of those blocking the roads before April "may not have risen to the level required to make criminal charges a real prospect at that time": at para. 51. The judge observed that "the methods of those impeding Teal Cedar have escalated to the point where serious property damage has been done and risk of serious personal injury has emerged" (at para. 54), leading him to "think there is every chance criminal law remedies will be employed": at para. 87.

45 Second, the judge noted that the BC Prosecution Service's charging policy specific to civil disobedience changed in 2009. Previously, the policy read: "the use of criminal sanctions in these situations is generally not appropriate": at para. 56. He concluded the present version left more room for using criminal sanctions, because it states that "the use of criminal sanctions in these situations may not always be in the public interest": at para. 55. The judge also relied on a letter from a Director with the BC Prosecution Service confirming that each case referred by police for the purpose of charge approval "is considered on its merits": at para. 20.

46 The judge accepted that the police have control over whether to investigate for *Criminal Code* offences and recommend charges, and the Prosecution Service has authority and discretion over whether to approve those charges, but under the enforcement gap analysis he found it necessary to assess the relative likelihood that police and prosecutors would pursue criminal enforcement measures: at para. 58. He was of the view that the conduct of the protesters was now so egregious that "the clear terms of the [BC Prosecution Service] policy would favour a decision to prosecute": at para. 59. Finding that outcome probable, the judge was not persuaded that there continued to be an enforcement gap.

47 In our view, the judge erred in so concluding. Nothing in the record before him supported the inference he drew that the police and BC Prosecution Service would now employ the criminal law to effectively stop the unlawful conduct. First, the conduct of the protesters did not differ materially from the behaviour that Verhoeven J. found to justify an injunction six months earlier. The number and complexity of the blockades had increased, and the conduct had endured for an additional period, but it was in essence as it had been from the outset: significant, persistent and in breach of the criminal law.

48 Second, the evidence before the judge supported the contrary inference. Blockades began in early August 2020. Teal Cedar reported them to the police in mid-December 2020, but no criminal charges or arrests followed. It was not until May 17, 2021, after the injunction was obtained and the RCMP had developed a plan to respond to it, that police began dealing with the blockades. As the judge himself observed in the *Conduct of Prosecution Reasons*:

[24] ... at the time the injunction order was pronounced, many months of road blockades and interruption of lawful Teal Cedar activities had not been met with a police response. The injunction application was made and granted. The injunction is in place and there is evidence that the order is often being defied. The public interest in avoiding depreciation of the Court's authority has emerged. The fact that the Crown has options other than to prosecute for criminal contempt is of little moment at this stage in the process.

[Emphasis added.]

49 Third, the 2009 changes to the wording of the prosecution policy relied on by the judge were minor. McEwan J. described them in *Galena Contractors Ltd. v. Zarelli*, 2014 BCSC 1256 at para. 8 [*Galena* #2], as "not materially different". Indeed, the general practice of restraint in invoking the criminal law against those engaged in civil disobedience continued unchanged after the amendment: *Galena Contractors Ltd. v. Zarelli*, 2014 BCSC 324; *Galena* #2; *Beaudoin*.

50 It is also noteworthy that the revised policy was in place throughout the 12-month period during which unlawful protests in the present case occurred, yet by the time of the judge's decision to deny the injunction extension, the BC Prosecution Service had approved only three of the 159 charges recommended by the police under the *Criminal Code*: at para. 20.

51 The judge proceeded on the basis that the gap identified by the Supreme Court of Canada in *Simpson* did not exist when the application to extend the injunction came before him. But it was, in our view, precisely the same. The protesters had engaged in significant, persistent, unlawful behaviour and the criminal law had not been used to stop them. It was for that reason that Teal Cedar sought to "fill the gap" with an equitable injunction.

52 Finally, and importantly, although the judge acknowledged that both the police and BC Prosecution Service have independent authority to decide when, whether and how they might engage the criminal law in responding to allegedly unlawful conduct, he failed to give that independence meaningful effect in his analysis. Instead, based on the wording of a policy intended to guide prosecutorial assessment of the public interest in initiating a criminal proceeding, the judge invoked his own understanding and assessment of the public interest and assumed it is more likely than not that the police and BC Prosecution Service would see it the same way. This perspective overlooks the independent lenses brought to bear by

the police and prosecutors in fulfilling their respective roles, the fact that there may be public interest considerations relevant to the exercise of their authority in a given scenario that a court is not alive to, and the case-by-case, individualized nature of their discretion. Respectfully, the approach taken here is contrary to long-standing judicial authority that the courts are "not as competent [as the Attorney General] to consider the various factors involved in making a decision to prosecute": *Krieger v. Law Society of Alberta*, 2002 SCC 65 at para. 32; *Miazga v. Kvello Estate*, 2009 SCC 51 at para. 46; *R. v. Nixon*, 2011 SCC 34 at para. 20; *R. v. Anderson*, 2014 SCC 41 at para. 47; *Ontario (Attorney General) v. Clark*, 2021 SCC 18 at paras. 29, 33, 41.

53 In summary on this ground of appeal, we conclude the judge erred in principle by considering the availability of the criminal law as a factor weighing against the granting of an injunction. He also erred in finding, as a fact, that the criminal law *would* be employed to address ongoing unlawful conduct.

2. Did the judge err by finding that the court's reputation would be diminished by continuing the injunction?

54 The judge identified a "strong public interest in maintaining the court's reputation for legitimacy and effectiveness": at para. 44. He concluded that the court's reputation was being damaged in two ways. First, by being pulled into the middle of the dispute between "citizens on one side and a logging company and the government on the other" (at para. 43); and second, by the manner in which the police were enforcing the injunction.

a) The court's continued involvement in the injunction proceedings

55 The first reputational concern is closely linked to the judge's view that the police and BC Prosecution Service should be using the criminal law to sanction significant civil disobedience, rather than leaving it to the courts to enforce civil injunctions which put courts on the "front line of these civil disobedience events": at para. 40. He described the criminal contempt proceedings that followed against those who refused to comply with the injunction as the conversion of the dispute into one "between citizens and the court": at para. 43.

56 There is little doubt that the type of prolonged and significant civil disobedience demonstrated in this case, and the refusal of many protesters to comply with the injunction, places great demands on the court, both in terms of recalibrating the injunction, and in overseeing criminal contempt hearings and sentencing. But, with respect, it is wrong to say that the court's role in upholding the law, which is the court's obligation, means that its reputation is being harmed.

57 The making of an order enjoining interference with the applicant's lawful rights does not imply approval of the activity -- the court is not "taking sides". From such questions, the court stands aloof. The purpose of the injunction is not to protect the activity, but to uphold the rule of law. It is only to the extent that the public misapprehends the role of the court that the court's reputation for impartiality and independence from the interests of the parties could be affected. But that is a matter of perception. The answer is to address the misperception head-on, as Chief Justice Esson did in *MacMillan Bloedel Ltd. v. Simpson*, [1994] 4 W.W.R. 24, 87 B.C.L.R. (2d) 154 (S.C.) when he determined to "climb on his bench" and make a statement to address the public's misunderstanding about the court's role in prosecuting

criminal contempt proceedings against unlawful protesters. As Pitfield J. stated in *Interfor v. Kern et. al.*, 2000 BCSC 1141:

60 At the end of the day, however, no matter how distasteful the task, the court cannot shirk its responsibility to ensure the rule of law. As affirmed by the Court of Appeal and the Supreme Court of Canada in *MacMillan Bloedel Ltd. v. Simpson*, the court will intervene when conduct which may be criminal in nature interferes with the exercise of private property rights. It will do so notwithstanding that the public perception may be that the court is favouring the rights of one party to the detriment of another.

[Emphasis added.]

58 The judge was faced with the complex and challenging task of managing a case involving large scale civil disobedience. As the Supreme Court of Canada observed in *Simpson*, the task of the court in these circumstances "is to find a way to protect the legitimate exercise of lawful rights while preserving maximum scope for the lawful exercise of the right of expression and protest": at para. 13. It is a task well within the scope of the court's expertise and one that it cannot refuse to undertake.

59 The court's reputational interest lies in its legitimacy and effectiveness, as the judge observed at paras. 43-44. Legitimacy is grounded in the court being independent and impartial: *Ell v. Alberta*, 2003 SCC 35 at para. 23. Effectiveness is grounded in the court having its orders enforced. No reasonable citizen reading the judge's numerous decisions in this case could question the court's impartiality, independence, or thoughtful concern for the various interests and rights in play before it. As to effectiveness, the injunction order was being enforced by police, and through prosecutions for criminal contempt.

60 The court's reputational interest is not concerned with the popularity of its decisions. Countless disputes require the court to make unpopular decisions, whether in staying serious criminal charges because of a breach of the *Charter*, or in upholding public health orders.

61 Further, in considering that the court's reputation would be protected by extricating the court from the dispute and leaving enforcement to "the police and those responsible for their direction" (at para. 58), the judge did not consider the reputational harm to the court from both leaving Teal Cedar victim to illegal blockades without a remedy, and in failing to uphold the rule of law. In cases of persistent and significant civil disobedience, the court has a constitutional role to fulfil. The rule of law demands access to independent courts with the power to enforce the law by granting effective remedies to those individuals whose rights have been violated: *R. v. Domm* (1996), 111 C.C.C. (3d) 449 at 455, 95 O.A.C. 262 (ON CA), leave to appeal ref'd [1997] S.C.C.A. No. 78.

62 To the extent that the judge identified a reputational concern with the court's ongoing involvement in the prohibition and sanctioning of unlawful conduct by the protesters, we respectfully conclude that he erred. The court's involvement in enjoining unlawful conduct is a necessary and fundamental aspect both of civil society and of the rule of law: *Cermaq Canada Ltd. v. Stewart*, 2017 BCSC 2526 at para. 71 [*Cermaq*].

b) The effect of police misconduct on the court's reputation

63 We turn now to the second reputational concern the judge identified -- the depreciation of the court's

reputation by the conduct of the RCMP in enforcing the court order. In our view the judge's conclusion that the court's reputation can be tarnished by the conduct of police officers is a clear error of law.

64 The judiciary is one of three branches of government; a second is the executive, made up of the premier and cabinet; a third is the legislature. The RCMP answers to the executive branch, in particular to the solicitor general. The court and the police are thus constitutionally independent of each other. An example assists in demonstrating this principle. When a judge issues a search warrant, and the police infringe a citizen's rights in executing that warrant, no one could sensibly suggest that the court's reputation has been depreciated. The administration of justice may be said to have been brought into disrepute by the police conduct, but that overarching systemic impact is not, as the respondents contend, synonymous with the court's reputation. Indeed, where police misconduct has occurred, the court's role is to hold the police accountable. That can be done by ruling evidence obtained in an illegal search inadmissible, or by staying criminal proceedings because of improper conduct by the police in investigating or in conducting arrests.

65 Nor does continuation of the injunction amount to an endorsement of unlawful police conduct, as the respondents submit. Both cases cited by the respondents in support of the proposition that improper police actions undermine judicial authority and independence are cases in which the court found police to be in contempt for failing to comply with court orders to deliver an accused to the court to participate in a criminal proceeding: *Royal Canadian Mounted Police No. 2 (Re)*, 2008 NWTTC 5; *R. v. Peel Regional Police Service* (2000), 149 C.C.C. (3d) 356, 48 W.C.B. (2d) 162 (Ont. S.C.J.). They do not by any stretch support the submission that the court and the police are indistinguishable components in the administration of justice.

66 The judge's focus on police conduct was perhaps not surprising in light of the record before him. One of the three applications argued at the hearing concerned alleged excesses by police in enforcing the injunction. However, the only application addressed by the judge was Teal Cedar's application to extend the injunction. Police conduct in that context should not have been the central focus. The conduct of an *applicant* may be relevant in determining whether it is just and equitable to grant an injunction (*Kern #1* at para. 63) but the judge made no finding of misconduct by Teal Cedar. Rather, the judge determined that the conduct of a third party, entirely independent of the applicant, weighed against the granting of the injunction. In effect, Teal Cedar was denied a remedy because of the court's concerns about police conduct in enforcing the injunction -- conduct Teal Cedar cannot control.

67 We note that ending the injunction and relying on the police to recommend criminal charges and the BC Prosecution Service to approve them would not, in any event, put an end to concerning police conduct. It would simply remove one level of oversight from the interactions between protesters and the RCMP. Nor would it ensure the logging roads would be open to the public, another public interest identified by the judge: at paras. 7, 15. As the judge noted, the *Forest and Range Practices Act* permits gates across industry-built logging roads: at paras. 8-10, 16-17. In addition, the protesters' ongoing barricades on public roads do not conduce to public access.

68 While it was open to the judge to address some aspects of police enforcement, such as the size of exclusion zones and restrictions on media access (at para. 78) by altering terms of the injunction, the police as independent actors have discretion as to when and how to enforce court orders. The injunction contains an enforcement clause which expressly recognizes that independence by preserving police

discretion on the manner and steps of enforcement. Further, as the judge recognized at para. 86, the court has no jurisdiction over police uniforms and identification. It is not the place of the court to oversee "police compliance with police policy" on such matters: *R. v. Bacon*, 2020 BCCA 140 at para. 45.

69 Despite this, the judge expressed considerable frustration with these aspects of police behaviour, addressing in detail at paras. 79 to 87 the command decisions of the RCMP to allow front-line members to remove individual identification and to not enforce the directive against wearing "thin blue line" patches. The judge noted that he had addressed this issue informally at a case management conference, suggesting that the RCMP consider asking their members to remove the patch when enforcing a court order. In response to the Attorney General of British Columbia's position that matters relating to RCMP attire were for the Commissioner of the RCMP, and that the thin blue line patch was a labour relations matter in which the court should not become involved, the judge said:

[86] Of course, I have no jurisdiction or inclination to make orders about RCMP attire or otherwise become involved in its labour relations. But the RCMP has made a choice not to enforce their direction against the wearing of a symbol that it knows is divisive. It must realize that in circumstances where RCMP members are enforcing the Court's order, the wearing of this symbol reflects on the Court. I intend to do no more than to consider the effect of this regrettable RCMP decision on the Court's reputation, which is a relevant public interest consideration on this application.

[Emphasis added.]

70 Counsel for the respondents submitted in argument that the rule of law concern in this case is primarily whether the police are acting "outside the law." We do not agree with that submission. The rule of law demands that everyone obey the law. Significant, organized, deliberate and persistent defiance of the law and court orders is a serious threat to the rule of law which is both the foundation of a functioning democracy and the refuge of every citizen.

71 By focusing on RCMP conduct, the judge effectively turned a private law matter into a public law one, assessing whether there had been an abuse of authority by police rather than focusing on Teal Cedar's interests as a private litigant. The balancing of harms in this civil case was between Teal Cedar and the respondents. As between them, "there is no contest regarding the magnitude of relative harm": *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355 at para. 78. Accepting that there is a public interest in protecting lawful protest, "there are no competing equities" to weigh or balance as between protesters engaged in illegal acts and Teal Cedar with its legal right to use logging roads and harvest timber: *Cermaq* at paras. 60-61.

72 The concerns legitimately raised by the judge about police conduct are not without remedy. Misconduct affecting the rights of protesters can be addressed both in the prosecution of contempt proceedings and in sentencing. Individuals arrested under an injunction may raise RCMP conduct in their trial and seek *Charter* remedies.

73 In addition, there are forums for the court to perform judicial oversight of RCMP enforcement of an injunction order. Members of the public who take issue with RCMP conduct and are harmed by it can bring civil claims against the RCMP. In addition, the RCMP is subject to nonjudicial oversight. Members of the public can make complaints against the RCMP to the Independent Civilian Review and Complaints

Commission and the Independent Investigations Office. Although the judge was of the view that these forums would take considerable time to address concerns, they are tasked with accountability of the RCMP and have processes that allow for a complete investigation into allegations. In contrast, an interlocutory injunction in which the RCMP is not a party is a difficult forum within which to assess the competing allegations made by the protesters and the police.

74 In summary on this issue, the judge erred in concluding that RCMP conduct diminished the court's reputation and was a factor to be weighed in the balance of convenience.

3. Did the judge err by giving insufficient weight to the public interest in upholding the rule of law?

75 In our view, little need be said on this ground of appeal. The judge reasoned that less weight should be given to the public interest in upholding the rule of law because Teal Cedar had failed to establish an enforcement gap, and because there were countervailing public interests in preserving the court's reputation by keeping it away from the front line of this type of dispute and from association with certain police conduct. Having found that the judge erred in principle in considering these factors, it follows that he did not give sufficient weight to the public interest in having the court uphold the rule of law -- when the irrelevant considerations are removed from the scales, the rule of law interest resoundingly tips the scales in favour of extending the injunction.

76 It is not tenable in a democracy for a group to abandon the democratic process and impose their will on others by force. In a complex, pluralistic society, the democratically-elected government makes laws, and the courts interpret and uphold them. Barring constitutional overreach, the laws and decisions flowing from them are to be respected and enforced.

77 Protests are part of a healthy democracy; criminal conduct is not. In the circumstances of this case, the injunction is all that stands between Teal Cedar and a highly-organized group of individuals who are intent on breaking the law to get their way. That the criminal law may be used in such circumstances remains a possibility, but it is within the control of neither Teal Cedar nor the court to compel the police and the BC Prosecution Service to charge and prosecute offences under the *Criminal Code*.

78 In conclusion, and with respect, we are of the view that the judge erred by giving weight to irrelevant considerations and by giving too little weight to the public interest in upholding the rule of law, which must be the dominant consideration in all cases involving significant and persistent acts of civil disobedience.

79 In their written submissions, the respondents submitted the judge's order should be upheld nonetheless and Teal Cedar denied an injunction because "he who comes into equity must come with clean hands": *Elford v. Elford* (1922), 64 S.C.R. 125. The respondents concede, however, that to justify refusal of relief there must be "such an 'immediate and necessary relation' between the relief sought and the delinquent behaviour in question that it would be unjust to grant the relief": *Wang v. Wang*, 2020 BCCA 15 at paras. 46-47. The remedy sought will not be granted if the applicant is relying on its own misconduct to establish a claim. In this case, Teal Cedar relies on irreparable harm caused to its business by the unlawful acts of protesters, not on its own conduct. In our view, no "clean hands" issue can arise in this case, quite apart from the absence of any finding by the judge that Teal Cedar had engaged in any improper conduct.

80 Finally, Teal Cedar applied to adduce fresh evidence to show that the judge's assumption that police would use the criminal law to keep the roads open was unfounded, and that police presence markedly diminished over the ten days between the injunction ending and the stay obtained in this Court. We are of the view that the new evidence is not likely to affect the result and we would accordingly not admit it. The respondents applied to adduce new evidence in reply only in the event that Teal Cedar's application were to be allowed. That application accordingly need not be addressed.

Disposition

81 The appeal is allowed, the order made September 28, 2021 is set aside, and the interlocutory injunction extended to midnight on September 26, 2022. The applications to adduce new evidence are dismissed.

82 For clarity, we confirm that the Supreme Court retains jurisdiction to vary the terms of the injunction order on application by any party. Teal Cedar is entitled to its costs against the respondents other than the Attorney General of Canada and British Columbia. No costs are payable either by or to the intervenor HFN.

L.A. FENLON J.A.

G.B. BUTLER J.A.

J. DEWITT-VAN OOSTEN J.A.

Foxgate Developments Inc. v. Jane Doe

Ontario Judgments

Ontario Superior Court of Justice

R.J. Harper J.

Heard: July 30, 2020.

Judgment: August 21, 2020.

Court File No.: CV-20-32

[2020] O.J. No. 3535 | 2020 ONSC 5038

Between Foxgate Developments Inc., Plaintiff (Applicant), and Jane Doe, John Doe, or any agent or person acting under their instructions, and other persons unknown, and the Corporation of Haldimand County, Defendants (Respondents)

(79 paras.)

Case Summary

Civil Litigation — Civil procedure — Injunctions — Considerations affecting grant — Irreparable injury — Serious issue to be tried or strong prima facie case — Interlocutory or interim injunctions — Prohibitive injunctions — Motions by plaintiff Foxgate Developments Inc. and defendant Corporation of Haldimand County for interim injunctions granted — Foxgate purchased land in County and when through process to obtain approval for development — After development was well underway, protesters entered on to land without permission and caused significant damage — There were no indigenous rights asserted against land and protesters did not oppose development during planning process or appeal approval of development — Protesters were enjoined from entering on land or interfering with development — Protesters were also enjoined from blocking roads or highways — Constitution Act, 1982, s. 35.

Motion by the plaintiff, Foxgate Developments Inc. (Foxgate), for an interim injunction enjoining the defendants from in any way impeding with, interfering with, intimidating or otherwise obstructing access to its land. Motion by the defendant, Corporation of Haldimand County (County), for an interim injunction requiring the individual defendants to remove any barricades or other obstructions from roads and highways. Foxgate acquired title to land, and other than notices of hydro and gas rights of way, there were no claims registered on title to the land. The Six Nations of the Grand River and the Mississaugas of New Credit (Six Nations) were notified of Foxgate's proposed development of the land. Foxgate obtained all necessary approvals to develop the land, and no one gave any notice that there was any potential or existing land claim by any indigenous community. Service contractors began working on the land. Approximately 12 people attended on the land without permission and proceeded to cause significant damage to the heavy equipment of the service contractors. On July 30, 2020 an interim injunction was granted in favor of Foxgate that, among other things, required all persons not authorized by Foxgate to be on the land to vacate. The injunction also prohibited anyone from interfering with the development on the

land. The injunction was made returnable on August 7, 2020 to allow any interested parties to make representations. Only Foxgate and the County filed materials.

HELD: Motions granted.

There were no indigenous rights asserted against the land. The so-called "land defenders" did not express any opposition to the processes under the Ontario Planning Act when that process was fully open, with proper notices to all interested persons. They did not appeal when the approvals were given, and they did not attempt to become involved in any archeological investigation. It was only after the residential development was well underway with approximately 176 homes sold and very large sums of money committed and spent by Foxgate and its agents and contractors, that the land defenders resorted to self-help and associated violence. If any representative group within the indigenous community wanted to assert a constitutional right, they must assert it in a manner that was within the accepted process, and they could not sit by and refuse to engage in bona fide consultations and legally accepted processes, or resort to civil and potentially criminal behavior in order to achieve their goals. There were serious and meritorious questions to be tried. Foxgate would suffer irreparable harm that could not be compensated in damages if the injunction was not granted, as its timely development had been stopped by the actions of the land defenders, who had ignored the Court process and orders of the Court. Homes that were sold would be delayed, and many bona fide purchasers and their families' lives would be severely impacted. The reputation of the developers and the development's future success had been put in jeopardy. In addition, residents and businesses in the community were seriously and negatively impacted by the actions of the protestors. Civil and potentially criminal disobedience placed the whole community in peril. Open and flagrant disregard for regular order, laws and orders of the Court could not be condoned or tolerated. Each of the requested injunctions was issued.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982,

Constitution Act, 1982, s. 35

Planning Act, R.S.O. 1990, c. P.13,

Rules of Civil Procedure, R.R.O. 1990, Reg. 194,

Counsel

P. DeMelo, Counsel for the Plaintiff.

ENDORSEMENT

R.J. HARPER J.

Chronology

1 There are two actions and motions for interlocutory injunctions before this court. Although they are separate actions, the factual basis for both are interconnected. The legal considerations are also

substantially connected. As a result, I will deal with both matters in this judgment. However, orders will be issued separately within the distinct actions.

2 The Plaintiff, Foxgate Developments Inc. (herein referred to as Foxgate) brought an application and an ex parte motion within that proceeding. That Court File Number, being: CV-20-32.

3 On July 30, 2020 I granted an interim injunction to Foxgate. The motion for an interlocutory injunction and my interim order were made returnable on August 7, 2020 at 9:30 a.m. by way of a virtual Zoom hearing. This would allow time for the notice of the order and motion to be posted and read publicly. Anyone who wished to respond to the motion would then have an opportunity to notify the parties and the court. An email address to send any notification to the court was contained in the order.

4 On August 6, 2020 the Corporation of Haldimand, named Defendants in the above action as Haldimand County (herein referred to as Haldimand) brought an application, the Court File Number being: CV-2000000032-000. In addition, they also brought an ex parte motion for an injunction to, among other things, prohibit anyone from preventing access and use of public highways and roadways in the Haldimand County catchment area. I made that motion returnable on August 7, 2020 at 9:30 a.m.

5 On the return of the motions, only Foxgate and Haldimand had material before the court. I received the evidence on the Haldimand motion and granted their request for an interim injunction.

6 At the same time, I extended the interim injunction of Foxgate and made it further returnable on August 25, 2020.

7 The following represent my written reasons for granting both interlocutory injunctions. For the purposes of these reasons, I will be referring to the evidence in both motions. As stated above, I find that the body of facts are related to the same series of events and it would be an unnecessary duplication to have to deal with them separately. It should also be pointed out that Foxgate supports the motion of Haldimand and Haldimand supports the motion of Foxgate.

8 On August 7, 2020 no material was filed in response to either motion. No one expressed any intention to defend either the motions or the applications.

9 In addition to the known parties, their counsel and a representative of the media, a number of individuals attended the virtual Zoom hearing on August 7, 2020. They identified themselves as observers.

The Issues

(I) The Foxgate Motion

10 There are two central issues on this motion:

11 First, whether to grant an interlocutory injunction, pending the trial of the action, enjoining the Defendants from in any way impeding with, interfering with, intimidating or otherwise obstructing access

to certain lands owned by Foxgate or its employees or agents, contractors or subcontractors, or their agents, from using these lands, until the trial of this matter or until any further order of this court.

12 Second, the motion further seeks an order requiring the Defendants to cease and desist their unlawful trespass and that any peace officer assist in the execution of the orders sought herein, including the removal of any persons who refuse to obey the provisions of the interlocutory order that may be granted.

(ii) The Haldimand Motion

The Central Issues

13 Whether or not the court should grant an interim/interlocutory order as follows:

- a. Requiring the Individual Respondents to tear down and remove any barricades or other obstructions placed, constructed or maintained by them, on Argyle Street, 6th Line, the Highway 6 bypass and McKenzie Road that may create an obstruction to access to the said roads.
- b. Requiring the Individual Respondents to vacate the blockaded areas on Argyle Street, 6th Line, the Highway 6 bypass and McKenzie Road referenced in the Affidavit of Cathy Case forthwith.
- c. Restraining the Individual Respondents and their servants or agents, whose identity is unknown, or anyone having notice of this Order from blockading, barricading, occupying, controlling or attempting to control access to or passage through, interfering with the use of by any person of, hindering, obstructing or impeding access to, any public highway, street, road or road allowance located in Haldimand, including Argyle Street, 6th Line, the Highway 6 bypass and all roads described in Schedule A ("the Subject Lands").

Background

14 Foxgate is the owner of lands that are municipally known as 1535 McKenzie Road, in the County of Haldimand. The lands are legally described as:

PT LT 3 RANGE WEST OF TOWNSEND TO CALELDONIA ROAD, GEOGRAPHIC
TOWNSHIP OF ONEIDA, NOW HALDIMAN COUNTY, DESIGNATED AS PARTS 1-10
INCL. 18R-6318, S/T EASEMENTS AS IN 06293, HC3242, HC 119162 & HC119163, PIN
38168-0390 (LT) (the "Lands").

15 The Lands were acquired by Foxgate on September 9, 2015. There are two Notice of Claims on the title. They both refer to claims of interest in the Lands by Ontario Hydro and Union Gas that provide access and the right to enjoy and use the Lands specifically identified as utility corridors.

16 After a review of the uncontested affidavit evidence filed by the Foxgate in these proceedings, and filed by Haldimand on August 6, 2020 in their proceedings, I make the following findings of fact:

From 2003 to 2015

17 A different development was being advanced on the same lands. In order to advance this development,

all applications that were required under the *Planning Act*, R.S.O. 1990, c. P.13 and other building, municipal and County by-laws were published and processed. This development, however, did not proceed to completion.

September 9, 2015

18 On September 9, 2015 Foxgate acquired title to the Lands. Other than notices of hydro and gas rights of way, there were no other claims registered on the title to the lands.

From September 9, 2015 to December 16, 2016

19 From the time that Foxgate became the titled owner to the Lands, they pursued all the necessary legal requirements in order to develop the Lands. This process included:

- d. Making an application for zoning by-law amendments and submitted a draft plan of subdivision. This process included:
 - i. Public meetings and requests for comments from any interested parties in accordance with the *Planning Act*.
 - ii. As a result of Haldimand having an agreement with the Six Nations of the Grand River and the Mississaugas of New Credit to notify them of pending developments, they were specifically notified of Foxgate's planned development.
 - iii. Pursuant to the agreement mentioned above, Haldimand circulated the applications, supporting documentation and reports to the Six Nations of the Grand River and the Mississaugas of New Credit.

January 24, 2017

20 All approvals pursuant to the *Planning Act* were obtained by Foxgate following the completion of the public process noted above. No one appealed any of the approvals.

21 A declaration of the Notion of Adoption of the Approval of the Draft Plan of Subdivision was issued on January 24, 2017.

Archeological Investigation

22 Foxgate entered into an agreement with the Six Nations of the Grand River and the Mississaugas of New Credit that allowed them to participate and assist in an archeological investigation of the approved development site. This investigation was completed and there was a finding that there were no areas of concern that would have any impact on the development.

From September 2015 to May 2019

23 No one gave any notice to the developers of Haldimand that there was any potential or existing land claim by any indigenous community.

May 2019

24 In May 2019, Foxgate entered into an agreement titled: "Definitive Agreement" with the Six Nations Elected Counsel ("SNEC") and the Mississaugas of New Credit. This agreement called for the transfer of a parcel of approximately 42 acres of land to the Six Nations of the Grand River. The SNEC was also given the sum of approximately \$325,000 to be held in trust for land development for Six Nations.

From the Fall of 2018 to July 20, 2020

25 Foxgate partners, Losani Homes and Ballantry Homes, started to sell new homes pursuant to the approved plan of subdivision. Any agreements were to have a November 2020 closing date. By July 20, 2020, one hundred and seventy-six (176) agreements of purchase and sale had been entered into.

26 In May 2020, service contractors began working on the Lands to install services including sewers, water, roadways. By July 20, 2020 much of the service contract had been completed. Up until July 20, 2020 there were no complaints or claims against the property or the development to Foxgate, its agents or contractors, or to Haldimand.

July 20, 2020

27 On July 20, 2020, approximately 12 people attended on the Lands. They did not have permission to be on the Lands from Foxgate or any of its agents or contractors. They continued to occupy the Lands and proceeded to cause significant damage to the heavy equipment of the service contractors. They spray bombed some of the heavy equipment, painted the phrase "1492 Land Back Lane" on a large construction container on the Lands and planted Six Nation Flags on the Lands and heavy equipment.

Injunctive Relief

28 On July 30, 2020 I granted an interim injunction in favor of Foxgate that, among other things, required all persons not authorized by the Foxgate its agents and contractors to be on the Lands to vacate the Lands. This interim injunction also prohibited anyone from interfering with the development on the Lands.

29 The seminal case on the test to consider whether to grant an interlocutory injunction is *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 where at page 334, Sopinka and Cory JJ. summarized the test as follows:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusing of the remedy pending a decision on the merits.

30 For the purposes of considering whether to grant an interlocutory injunction, I am also guided by the often-quoted comments of Justice Robert J. Sharpe in his text, *Injunctions and Specific Performance*,

loose-leaf, revision 28 (Canada Law Book, 2019). With respect to interference with property rights, the text notes at para. 4.610:

Under our system of law, property rights are sacrosanct. For that reason, the rules that generally apply to injunctions do not always apply in cases such as this. The balance of convenience and other matters may have to take second place to the sacrosanctity of property rights in matters of trespass.

31 In the case before me, no person or entity has filed any responding material or otherwise put in an appearance or even expressed a desire to respond or appear. From the media reports that have been filed as exhibits to both Foxgate and Haldimand's materials it appears that those who have been occupying the Lands and obstructing highways and roads in Haldimand County are content to raise any of their concerns in the media as opposed to the court.

32 From the media reports, the protestors refer to themselves as "land defenders". However, the nature of any of their defense to land is to resort to self-help and violence instead of participating in the court process. On both occasions that this matter was in this court, I indicated that anyone who wanted to participate in these proceedings should do so. Otherwise this court can only make decisions on the basis of uncontradicted evidence that is properly placed before it.

33 When this matter was before me on August 7, 2020, I repeated my urging of those who wanted to participate to respond within these proceedings. In addition, I expressed a willingness to consider an order to have this matter case managed by the Regional Senior Justice's office pursuant to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. This would allow for an opportunity for parties to consult and make efforts to settle. No one has come forward in order to participate in this hearing by responding or invoking this rule.

Consultation

34 The matter before me is factually similar to the circumstances that led to the eventual appeal of the injunction granted by Cunningham J. in *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534, 91 O.R. (3d) 1. The Ontario Court of Appeal outlined those factual circumstances as follows at para. 17:

[17] Frontenac first sought an interim injunction against the AAFN and the Shabot to restrain them from interfering with its exploration program. Frontenac's motion was heard on August 23, 2007. The appellants filed no evidence and made no submissions on this motion. Instead, counsel for the appellants attended and advised the court that they had, respectfully, decided not to participate in the injunction proceedings and had written to the Premier of Ontario to propose negotiations to end the dispute. On August 27, 2007, Thomson J. granted the order sought by Frontenac.

35 In this case, no one made submissions on behalf of anyone who was conducting themselves in a manner that interfered with Foxgate's development of the Lands or the unobstructed use of public thoroughfares within Haldimand's jurisdiction.

36 As the proceedings moved toward contempt hearings in *Frontenac*, the parties impacted by the contempt motion and others sought to engage in the court process. The matter was returned to

Cunningham A.C.J.S.C., as he then was. With the prompting of Cunningham A.C.J.S.C. and the involvement of Scott J., the parties entered into a process of mediation.

37 The mediation was not successful. The alleged contemnors were found guilty of contempt and received a sentence. The matter then went to the Court of Appeal.

38 The Ontario Court of Appeal commented on the issue of the rule of law when considering the rights enshrined in s.35 of the *Constitution Act, 1982* at paras 43-46:

[43] In my view, the stage at which the comprehensive and nuanced description of the rule of law expressed in *Henco* must be considered is when a court is requested by a private party to grant an injunction and where doing so might have an adverse impact on asserted aboriginal and treaty rights affirmed in s. 35 of the *Constitution Act, 1982*. Such cases demand a careful and sensitive balancing of many important interests in assessing whether to grant the requested injunction and on what terms.

[44] In the present case, as in *Henco*, the competing interests include the asserted aboriginal rights of the Algonquin First Nations, Frontenac's private interest in pursuing its exploration plan in accordance with valid mining claims and agreements, and respect for the Crown property rights of Ontario.

[45] And how are these interests to be effectively balanced? The answer has been clear for almost 20 years in the jurisprudence of the Supreme Court of Canada - consultation, negotiation, accommodation, and ultimately, reconciliation of aboriginal rights and other important, but at times, conflicting interests: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; and *Mikisew Cree First Nation v. Canada (Minister of Canada Heritage)*, [2005] 3 S.C.R. 388. The honour of the Crown requires that it act as a committed participant in the undoubtedly complex process of consultation and reconciliation: *Haida Nation*, *Taku River* and *Mikisew Cree*.

[46] Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings.

39 In the case before me, there have been no aboriginal rights asserted. The ability to consult and negotiate with those who have not and will not engage the court process is limited.

40 Regarding the duty to consult, the Supreme Court of Canada stated in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 SCR 227, at paras. 29-30:

[29] The duty to consult is triggered "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35. The content of the duty varies depending on the context, as it lies on a spectrum of different actions to be taken by the Crown: *Haida Nation*, at para. 43. An important component of the duty to consult is a requirement that good faith be shown by both the

Crown and the Aboriginal people in question: *Haida Nation*, at para. 42. Both parties must take a reasonable and fair approach in their dealings. The duty does not require that an agreement be reached, nor does it give Aboriginal peoples a veto: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at paras. 2 and 22; *Haida Nation*, at para. 48.

[30] The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature: *Beckman*, at para. 35; Woodward, at p. 5-55. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights: see, e.g., *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517, 55 Admin. L.R. (4th) 236.

41 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the Supreme Court described the scope of the duty to consult at para. 37:

[37] There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

42 In my view, it is not possible to differentiate between tenuous claims, claims possessing a strong *prima facie* case and established claims when those resorting to self-help refuse to engage in the court process. The persons who call themselves the "land defenders" have done nothing since, at least, 2015 when Foxgate became the titled owner to the Lands. Nor is there any evidence that they expressed opposition to the proposed plans submitted between 2003 and 2015.

43 From the time the Foxgate submitted their plans for development of these Lands, the "land defenders" did not express any opposition to the *Planning Act* processes even when this process was fully open with the proper notices to all interested persons. They did not appeal when the necessary approvals were given. They did not engage with the SNEC when that representative body entered into the "Definitive Agreement", nor did they attempt to become involved in the archeological investigation.

44 It was only after this residential development was well underway with approximately 176 homes sold with expectations of closing for those 176 families for November 2020 and very large sums of money had been committed and spent by Foxgate and its agents and contractors did the "land defenders" initiate their resort to self-help and associated violence.

45 The Supreme Court of Canada in *Haida* stated at para. 42:

[42] At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised

(*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

46 If any representative group within the Aboriginal community wants to assert a constitutional right, they must assert it in a manner that is within an accepted process. Resort can be made to the Courts, the Land Claims Tribunal, or direct negotiations with the appropriate level of Government. However, they cannot sit by and refuse to engage in *bona fide* consultations and legally accepted processes. They cannot resort to civil and potentially criminal behavior in order to achieve their goals.

47 In the case of the *City of Hamilton v. Loucks*, 232 D.L.R. (4th) 362 (Ont. S.C.), Henderson J. was dealing with a group of individuals who had effectively shut down the construction of what is known as the Red Hill Expressway. He stated at para 55:

[55] Lastly, the defendants submit that a certain limited amount of civil disobedience is acceptable in our society as civil disobedience has been one of the cornerstones in the advancement of democracy. Again, this is an attractive argument, but one that is doomed to fail. I accept that historically many good causes have been promoted through the use of civil disobedience, but those who have engaged in such conduct have always been subject to the sanctions of the courts as a consequence. Individuals in our society cannot be allowed to engage in unsanctioned unlawful conduct. If that were allowed there would be little need for any of the laws of this country. All of the citizens of our country must be compelled to obey the law.

[56] If there is any doubt about the assertion that our country is governed by the rule of law it is resolved by the preamble to the *Charter* that states "*Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law*". In summary, all of the citizens of Canada are required to obey the law. It is my duty to ensure that each and every person obeys the law. It would be a dereliction of my duty if I were to permit the defendants to shut down the Project by breaking the law, and thereby allow them to circumvent the many assessments and reviews that have been conducted to date.

CIRCUMSTANCES AFTER THE FOXGATE INTERIM INJUNCTION ORDER

48 On August 5, 2020, the OPP caused those occupying the Lands to vacate the Lands pursuant to my interim injunction order of July 30, 2020. Some of the protesters resisted and were arrested.

49 Shortly after this action by the OPP, multiple protestors who were sympathetic to the those occupying the Lands set up blockades on Argyle Street, the main thoroughfare in Caledonia and the Highway 6 bypass of Caledonia.

50 Several other fires were set at or near 6th Line in Caledonia. This included setting an excavator on

fire. When fire fighters arrived and attempted to put that fire out, they were greeted by protestors throwing rocks at them. The fire fighters were forced to leave out of fear for their safety and were unable to put out the fire.

51 Unidentified protestors, who also appeared to be in support of the protestors on the Lands, threw truck tires onto the highway along with construction skids and lit them on fire. They fueled the fire with an accelerant and thick black smoke could be seen billowing from the fire site.

52 The OPP and Haldimand County officials estimated that there were approximately 100 protestors involved.

53 After the above incidents, Haldimand brought their application and request for an interlocutory injunction preventing anyone from blockading any highway or thoroughfare within the catchment area of Haldimand County. I granted the interim injunction and made it returnable at the same *in person hearing* as Foxgate's motion on August 25, 2020 at 10 a.m. at the Superior Court in Brantford.

54 The very next day after the OPP enforced Foxgate's interim injunction and removed the protestors, they returned to the site of the Lands and have occupied them ever since. The protestors continue to blockade Argyle St and Highway 6 in Caledonia.

The Application of the RJR MacDonald Test

55 It is important to point out that the claims of the "land defender"/protestors have not been advanced within these proceedings. In the media reports attached to both the Haldimand action and the Foxgate action, there are numerous references to spokespersons allegedly speaking on behalf of the "land defenders". The assertion in the media reports by the alleged spokespersons is that this is an issue between sovereign nations. They assert, in the media only, that this land was never ceded by the Haudenosaunee. They assert this as a land claim. It is not a land claim.

56 I agree with Turnbull J. in *Ah'she hodeeheehonto v. Bomberry*, 2010 ONSC 3701 when he stated at para 18:

[18] I find that this application has nothing to do with land claims. The ongoing case of *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada and her Majesty in Right of Ontario*, court File Number 406/95, commenced in Brantford deals with a land claim. In that action, the Six Nations elected Council, on behalf of all of Six Nations, is prosecuting a claim against Canada and Ontario for an accounting of the land and money it alleges it should have received from the Haldimand Proclamation of 1784 and which land was removed by so-called "surrender". The application before this court deals with trespassing by the applicant on land in which he has no lawful interest.

57 The case referred to by Turnbull J., *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada*, has been within the Superior Court since 1995. This case involves multiple and complex land claims issues. In or about 2017 the matter was transferred by order of Morawetz R.S.J., as he then was.

58 The case management judge, Sanfilippo J., outlined the procedural history of the land claim action in

Six Nations of the Grand River Band of Indians v. The Attorney General of Canada, et al, 2018 ONSC 1289, at paras 1-2:

[1] This action was initiated by statement of claim issued on March 7, 1995. The plaintiff, Six Nations of the Grand River Band of Indians, alleges that the defendants, Attorney General of Canada ("Canada") and Her Majesty the Queen in Right of Ontario ("Ontario"), or their predecessors, breached fiduciary and treaty obligations alleged to be owed and thereby seeks an accounting, declaratory relief, equitable compensation and references in connection with events that largely took place in the 18th and 19th centuries.

[2] The action was initiated in Brantford, Ontario, and was there subject to case management by Justice J.C. Kent. It was transferred to the Superior Court in Toronto, on consent, pursuant to the Order of Regional Senior Justice Morawetz dated November 24, 2017.

59 Sanfilippo J. then reviewed some of the lengthy history of the matter at paras. 3-8:

[3] On January 3, 2018, a request was made, on consent, for this action to be subject to case management. On January 5, 2018, I was appointed as the case management judge.

[4] The first case management conference was conducted on January 31, 2018 (the "1st CM Conference").

[5] This action had a lengthy period of active litigation, which resulted in the exchange of numerous affidavits of documents and document lists. In the result, the parties collectively produced over 31,000 documents. The discovery representative of Canada was examined for five days in 2000, both preceded by and followed by extensive motions on discovery issues.

[6] This action was placed in abeyance for a period of more than six years, on consent of all parties, but has since been taken out of abeyance and has entered a stage of renewed, active litigation.

[7] The parties agreed to a discovery plan in March 2016 which incorporated a detailed electronic discovery protocol. By continued use of this discovery plan, the parties are currently engaged in discovery and attempting to narrow factual issues in dispute before trial through a process of detailed requests to admit, supplemented by written discovery.

[8] To date, the plaintiff has delivered eleven requests to admit, of which ten have been answered, while Canada has delivered one request to admit, which has been answered. The plaintiff also delivered to Ontario, in April 2017, an instalment of written questions

60 *Six Nations of the Grand River Band of Indians* case involves claims for an accounting and for damages. It does not seek any other interim order to halt any development on lands that may be in the area being disputed in that case. It includes massive amounts of evidence dealing with the extent of the Imperial Crown's duties, liabilities during the periods prior to confederation, and the extent to which the Government of Canada has assumed any of those duties and responsibilities.

61 The case also involves evidence that deals with multiple treaties and documents of surrender of lands even before the 1700s.

62 The above noted cases are cited to show how complicated and cumbersome these cases must be in order to achieve a process that is fair and comprehensive. Having said that, the fundamental goal is to

achieve fairness within the recognized court and administrative law processes. As alluded to earlier, the need to engage in various levels of negotiations with the Federal and Provincial Governments are also avenues that must be explored.

63 Lederer J. is presently dealing with a land claim that asserts title and damages in the case of *CREES (EEYOU ISTCHEE) et al v. Canada (Attorney General) et al*, 2017 ONSC 3729, [2017] 4 C.N.L.R. 47. Even when there are identified parties seeking a land claim, damages, and possibly s. 35 rights, the complexities are monumental. In the case before Lederer J., he outlines some of the challenges at para. 28:

[28] It is a conundrum. Do we start narrow and allow issues to broaden out as we proceed and they become clearer? Should we start wide open and look to put in limits when the issues are more precisely defined? This is a land claim. It speaks to our effort to find reconciliation. In this situation not only is the court being asked to resolve a dispute between First Nations and the Crown but, at the same time to resolve internecine ("mutually destructive") disagreements between First Nations. The problem is not made easier by the failure of the two levels of government which are, after all, the defendants in the action and a main player in our effort to find reconciliation, to make any contribution to how it should be resolved.

64 Regardless of the complexities, when parties resort to the court to assert their claims the court has a duty to ensure its processes are followed, its Orders are obeyed and its processes are fair to everyone.

65 I have also considered the comments of Arrell, J. in *The Corporation of the City of Brantford v. Montour et al*, 2010 ONSC 6253, 104 O.R. (3d) 429. Arrell J. was dealing with a request from The City of Brantford for an interim injunction to prevent work stoppages at specific sites within the City. The Respondents in that case caused work stoppages at a number of projects being developed. By the time the matter came before Justices Arrell, the blockade and stoppages at the development sites were escalating to the point of being a daily occurrence with the real threat of violence.

66 The Respondents, in that case, were principals of what was called the "Haudenosaunee Development Institute" ("HDI"). The Haudenosaunee Confederacy Chiefs had formed the HDI to cause developers to come to them in order to pay fees and make applications for any development in a prescribed area in Brantford. The members of the HDI took the position before Justice Arrell that the lands in question formed part of the Haldimand Tract and were in fact Haudenosaunee lands that were never ceded.

67 In dealing with the issue of the interim injunction, Justice Arrell stated at para. 51:

[51] I am given further comfort that Ms. Holmes has the preferable opinion by the fact that the Six Nations, despite 25-30 years of archival research on their own, have never elected to commence any legal proceedings against any entity, being either private or government, for the return of this land or title to the land. They did commence a lawsuit in 1995, which has been dormant for the last few years, for compensation. As well they have filed 29 land claims with the federal government for compensation.

68 No First Nations group or individual has made a land claim within these proceedings. First Nations groups and individuals cannot simply sit on the sidelines after a lengthy legal process has been initiated to advance a subdivision plan, then obstruct the process by asserting various claims in the media and not the courtroom.

69 In both of the court actions before me there are serious and meritorious questions to be tried.

70 Haldimand in Action # CV-2000000032-00 and Foxgate in Action # CV-20-32 would both suffer irreparable harm that cannot be compensated in damages.

71 Foxgate's timely development of their Lands has been stopped by the actions of the "land defenders"/protestors. They have ignored this court process and ignored the orders of this court. The homes that are sold by the agents and contractors of Foxgate will be delayed and many *bona fide* purchasers and their families' lives will be severely impacted.

72 The reputation of the developers and the development's future success has been put in jeopardy. Prospective buyers will be extremely wary of purchasing homes and moving to a community where apparent lawlessness would put their families at risk. Haldimand is faced with protestors who have placed Caledonia and surrounding areas within Haldimand at risk. The community cannot be assured that by-laws and Provincial legislation that directs an orderly process for developments will apply equally to everyone.

73 The civil and potentially criminal disobedience that is replete in the evidence before me places that whole community in peril. Black burning tire smoke billowing into the air is as much a toxic health risk as it is a toxic emotional and psychological risk to the Haldimand community.

74 Residents and businesses in the Haldimand community are seriously and negatively impacted by the actions of these protestors. People cannot have the regular use and enjoyment of their homes with roads and highways blocked. Their health and safety is in jeopardy when lawless activity is allowed to prevail.

75 People who have businesses in the community are impacted with individuals finding it extremely inconvenient to travel given the blockades and other disruptions. Putting it bluntly, very few people want to go into a community and do business when they have reason to believe that not only would it be inconvenient to do so, but also their own health and safety would be at risk.

76 There is no award of damages that could adequately compensate either Haldimand or Foxgate in the cases before me.

77 Open and flagrant disregard for regular order, laws and orders of this court cannot be condoned or tolerated. If the rule of law is not upheld in the circumstances of this case, chaos, mayhem and anarchy would prevail. This is not the way our Canadian society is. Central to our values is the rule of law. It applies to everyone, without exception.

78 I find that the *RJR-MacDonald* test has been met in both the Haldimand case and the Foxgate case.

79 Each of the requested injunctions shall issue in accordance with the draft order submitted.

R.J. HARPER J.

End of Document

Class Proceedings Act, 1992

S.O. 1992, Chapter 6

Consolidation Period: From June 3, 2021 to the e-Laws currency date.

Last amendment: 2021, c. 25, Sched.1.

Court may determine conduct of proceeding

12 The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 2020, c. 11, Sched. 4, s. 14.

Gray v. Ontario

Ontario Judgments

Ontario Superior Court of Justice

R.J. Smith J.

Heard: September 22, 2005.

Judgment: September 29, 2005.

Court File No. 05-CV-000588OT

[2005] O.J. No. 4221 | [2005] O.T.C. 875 | 142 A.C.W.S. (3d) 928 | 2005 CarswellOnt 4878

PROCEEDING UNDER the Class Proceedings Act, 1992 ("CPA") Between Ann Gray, by her litigation guardian James Gray, plaintiff, and Her Majesty the Queen in Right of the Province of Ontario, Dalton McGuinty, Sandra Papatello and John Doe, defendants

(46 paras.)

Case Summary

Administrative law — Legislative powers or function — Application for injunction preventing closure of residence for mentally handicapped adults dismissed, as balance of convenience favoured allowing Province to proceed with closure according to legislative directive.

Civil procedure — Parties — Class or representative actions — Injunctive relief not available prior to certification of action as class proceeding.

Civil procedure — Injunctions — Considerations affecting grant — Public interest — Parliamentary decision to close residence for mentally handicapped adults presumed to have been made in public interest.

Health law — Hospitals and health care facilities — Administration — Hospital closings — Injunction granted restraining Province from relocating residents of facility to be closed, pending judicial review of decision to close facility.

Application by Gray for an interim injunction preventing the Province of Ontario from transferring residents of the Rideau Regional Centre, a residence housing mentally handicapped adults, to another facility without their consent or the consent of their guardians. Gray also applied for an injunction preventing the Province from closing the Centre until the final outcome of the action. The action was commenced by Gray as a class proceeding on behalf of herself and other residents of the Centre, following a legislative decision to close the Centre and to transfer all its residents to independent community-based agencies by 2009. The claim alleged the Province breached its fiduciary duties, *parens patriae* duty, and the rights of Centre residents by making this decision.

HELD: Application dismissed.

The court did not have jurisdiction to grant the relief Gray requested prior to the class proceeding being certified. There was no evidence presented of bad faith or unconscionable conduct on the part of the Province warranting such relief. Gray and the Public Trustee had standing to make the application on behalf of Gray and the unknown residents without guardians. Gray's affidavit evidence established there was a serious issue to be tried. Irreparable harm would result if the rights of Gray and the other residents were found to have been breached if the proposed moves were allowed to occur. The balance of convenience favoured the Province, because of the presumption that Parliament acted in the public interest and because a class proceeding could delay the implementation of the legislative decision for ten years or more. The action was converted to an application for judicial review, as all the remedies sought were available through this procedure and the matter would be dealt with in a more expeditious and less expensive manner. A stay was granted preventing the Province from moving any residents for 90 days.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, ss. 7, 12

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12

Developmental Services Act

Developmental Services Regulations

Regulation 272

Federal Court Act

Judicial Review Procedure Act, R.S.O. 1990, c. J.1, ss. 1, 2(11), 6(2), 7, 8

Ontario Rules of Civil Procedure, Rules 1.04

Counsel

Brenda Hollingsworth and David Hollingsworth, for the Plaintiff

Sara Blake, Darrell Kloeze, and Sean Hanley, for the Defendants

Marilynne Glick and Laurie Redden, Counsel for the Public Guardian and Trustee

REASONS FOR DECISION

R.J. SMITH J.

1 The residents of the Rideau Regional Centre (the "RRC") consist of approximately 429 severely mentally handicapped individuals, who have lived at the RRC for an average of 39 years and whose

average age is in their mid-fifties. Many of the residents also suffer from other severe physical and psychological problems. Ms. Gray is one of the residents at the RRC.

2 The Plaintiff seeks an interim injunction preventing Her Majesty the Queen in Right of the Province of Ontario and the personal defendants, (the "Province") from transferring any residents of the RRC to any other facility without their consent, or the consent of their guardians, and an interim injunction preventing the Province from closing the RRC until all issues are finally decided in the action. The Plaintiff alleges that the Province has deprived Ms. Gray of her right to liberty and the security of her person as protected under s. 7 of the Canadian Charter of Rights and Freedoms (the "Charter"), without following the principles of fundamental justice on the following basis:

- (a) Ms. Gray argues that she has been deprived as her individual dignity and independence as she was and denied any opportunity to have meaningful input into the important life choice of whether she should be forced to leave her home of approximately 50 years and move to a community based facility; and
- (b) Ms. Gray argues that given her special limited mental and emotional capacity, she will suffer profound stress and her personal psychological integrity will be adversely affected as a result of the Province's decision to close the RRC.

3 The Office of the Public Guardian and Trustee supports the Plaintiff's request for an injunction, and represents the interests of the residents who do not have a legal guardian or any next-of-kin to speak on their behalf.

4 The motion for an interim injunction was made before a motion for certification as a class proceeding has been held, and therefore at this point in time, the class has not been defined and the matter has not been certified as a class proceeding.

5 The Province seeks to continue moving residents to community based facilities, and argues that its policy of moving residents from institutions like the RRC to community based agencies is a long standing government policy, adopted in the 1980's, which is in the best interests of the residents and in the public interest. The Province further argues that the residents are not entitled to any procedural fairness, and since the Province is the owner of the RRC it can demolish the building if it wishes and the residents' choices are limited to where they might wish to live, other than at the RRC.

6 The Province further argues that the Plaintiff does not have standing to represent any of the other residents other than herself, as the action has not been certified as a class proceeding, and that an injunction should not be granted as the Plaintiff has not raised a triable issue, has not shown irreparable harm, and has not shown that the balance of convenience favours suspending the Cabinet decision to close the RRC until the litigation is completed.

7 In this motion, the court must decide the following issues:

- (a) Does Ms. Gray have standing to represent other residents of the RRC on this interim injunction?
- (b) Should an interim injunction be granted as requested?

- (c) Should the action and motion be converted to an application for judicial review of the Cabinet decision, made on September 9, 2004, to close the RRC, for a declaration that the Cabinet decision violated Ms. Gray's s. 7 Charter rights, and for a mandamus order that the Province continue to operate the RRC? And,
- (d) If the action should be converted into an application for judicial review should a stay be granted to prevent the transfer of any residents to other facilities without their consent; and if so, for what period?

Background

8 The Plaintiff has issued a statement of claim under the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "CPA") seeking a declaration that Her Majesty the Queen in right of Ontario and the other personal defendants have breached its fiduciary duties; breached its parens patriae duty; breached the Plaintiff's and other RRC residents' rights under ss. 7 and 12 of the Charter; an interim and permanent mandatory injunction that the Province continue to operate the RRC with a level of service equal to that on September 9, 2004; an interim injunction prohibiting the Province from transferring any resident (member of the proposed class), without their guardian's consent, until all issues are finally determined; and compensatory, punitive or exemplary and aggravated damages.

9 The Province has owned and operated the RRC, which is located in Lanark County near Smith Falls, as a Schedule 1 facility under Regulation 272 of the Developmental Services Act since 1951. The evidence of Mr. Gray, concerning the residents is as follows:

- (a) That approximately 429 individuals reside at the RRC;
- (b) That over 300 residents are profoundly mentally handicapped and approximately 90 are severely handicapped;
- (c) That most of the residents have an IQ of less than 40 and exhibit a mental age of less than four;
- (d) That a significant number of residents have an emotional disability along with their mental disability;
- (e) That the residents have an average age of 54 and range from the 30s to the early 80s;
- (f) That the residents have resident at the RRC on average for 39 years, and 60% of the residents have lived at the RRC for more than 35 years;
- (g) That few residents possess verbal skills of any magnitude, and most are without any verbal skills; and
- (h) That none of the residents are capable of independent living, or making informed substantive decisions about their lives; and also suffer from chronic long-term physical disabilities; and many are susceptible to frustration with a variety of self-destructive or anti-social behaviours.

10 From the year 200[...] until 2004, residents were discharged only if a parent or guardian requested a discharge, and virtually no discharges were made during this period. [Editor's note: This date is incomplete in the electronic copy received from the Court.]

11 On September 9, 2004, the provincial Cabinet decided to close the RRC facility by 2009, and to transfer the remaining residents to independent community based agencies over the next five years, to be completed by 2009. A number of residents will be transferred at the end of September and other in October and November of 2005 and monthly until 2009.

Issue #1 - Does Ms. Gray have standing to represent other residents of the RRC on this motion for an interim injunction?

12 The Plaintiff argues that since the proceeding was commenced under the CPA, the court has jurisdiction under s. 12 to make an interim injunction affecting members of the proposed class. Section of the CPA reads as follows:

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

13 The courts have granted relief under s. 12 of the CPA prior to certification in very limited circumstances, generally to prevent improper communications with class members. In *Vitelli v. Villa Giardino Homes Ltd.* (2001), 54 O.R. (3d) 334 (S.C.J.), Cumming J. stated as follows at paras. 37 and 38 of his decision:

[37] Section 12 of the CPA confers on the court broad remedial discretion. This discretion has been granted in large part to ensure that the court can maintain some level of control over the fairness of the class proceeding.

[38] To my mind, these considerations lead me to conclude that when there is sufficient evidence of inappropriate behaviour, the court can properly exercise its discretion under s. 12 of the CPA and impose conditions on communications between the parties and putative class members in order to ensure the integrity of the class proceeding.

14 In *Pearson v. Inco Ltd.* (2001), 57 O.R. (3d) 278 (S.C.J.), Nordheimer J. stated as follows at para. 10: [10] I confess that the wording of s. 12 does not make it clear to me how it confers jurisdiction on the court to make orders prior to the certification of the proceeding as a class action since the section expressly refers to "class members". Arguably, one cannot be a class member until a class is certified which would, in turn, suggest that the section was not intended to operate until a class existed. However, other decisions of this court have relied on s. 12 to grant such orders - see, for example, *Vitelli v. Villa Giardino Homes Ltd.* (2001), 54 O.R. (3d) 334 (S.C.J.) and *Lewis v. Shell Canada Ltd.* (2000), 48 O.R. (3d) 612, 46 C.P.C. (4th) 378 (S.C.J.). While I am not bound by those decisions, I would be loathe to disagree with their conclusion unless compelled to do so. I am also cognizant of the fact that, even if the section does not grant the required authority, presumably a party could still have resort to the inherent jurisdiction of the court to control its own process to obtain such relief. The issue is one that, in the end result, therefore, appears unnecessary to address. That being said, though, the jurisdictional concern only reinforces in my mind that any intervention by the court in such circumstances should be narrowly directed and sparingly

employed since it serves to interfere with what otherwise would be the normal rights of parties, and others, to conduct their affairs as they see fit.

15 In *Chen v. Canada (Minister of Immigration and Citizenship)*, [2004] F.C.J. No. 567, Snider J. stated that the above discussion by Nordheimer J. reflects a number of reasons why court directions to putative class members should only be given in exceptional circumstances, before certification. Snider J. proceeded to identify an exception when "either the plaintiff or the defendant purports to communicate, or otherwise deal, with members of the proposed class in a fashion, and to a degree, that would visit an injustice on those persons or would otherwise undermine the integrity of the class proceeding itself. Intimidating conduct ... or seeking to have their claims settled without adequate information" are two such examples of exceptions. I agree with the reasoning in the above cases, and find that some conduct, whereby an injustice is being perpetrated or attempts are being made to undermine the integrity of the class proceeding itself is required before granting an interim injunction prior to the class proceeding being certified. In this case, there is no evidence of bad faith, or unconscionable conduct by the Defendants, as the Minister announced her decision to close the RRC in September 2004, approximately one year ago, and the Province has been following the same policy since the mid-1980's. As a result, I do not find that there is jurisdiction in these circumstances, under s. 12 of the CPA, to grant relief as requested.

Parens Patriae and inherent jurisdiction of the Court

16 In the case of *Borisova v. Canada (Minister of Citizenship and Immigration)*, [2003] 4 F.C. 408, Gibson J. ordered the Minister of Citizenship and Immigration to refrain from finally rejecting applications for permanent residence, submitted prior to January 1, 2002. This decision was not made under the CPA, but rather was an injunction granted under the provisions of the Federal Court Act.

17 The Plaintiff filed a list of a further 157 guardians of residents of the RRC, who have retained the Plaintiff's law firm to represent them, to obtain an injunction preventing the closure of the RRC. In addition, the solicitor for the Public Guardian and Trustee was added as a party on consent, and represented those residents who lacked guardians or next-of-kin and also lacked capacity to make decisions on their own behalf. The 157 guardians have not filed the required affidavits or the undertakings agreeing to be responsible for costs, as required to be appointed as litigation guardians. In the alternative, the Plaintiff relies on the inherent jurisdiction of the court, and the *parens patriae* power of the court to make an order affecting other residents who are not parties to this proceeding.

18 The parties that are present and part of this proceeding are Ms. Gray, by her litigation guardian, and also those unknown residents who are represented by the Public Guardian and Trustee. These parties seek an order preventing the Province from moving them and the other residents from the facility, without their consent, as they submit the movement of other residents would deprive the Plaintiff of any meaningful remedy, which is to seek to have the Court hear their submissions, and to have the Province maintain the RRC facility and allow those residents who wish to continue to reside at the RRC to do so until the matter has been heard. I find that it would be fundamental that no resident of the RRC should be adversely affected by any order, which was contrary to their interests, in a proceeding to which they are not parties.

19 I find that the order sought by Ms. Gray on her own behalf, and by the Public Guardian and Trustee on behalf of some residents, would not adversely affect any other resident who did not wish to move to a community based facility and that if the Province was allowed to move all other residents from the RRC

without their consent, it would deprive Ms. Gray of any meaningful remedy. I am satisfied that Ms. Gray has standing to seek the relief requested on her own behalf, based on the inherent jurisdiction of the Court and since no other resident of the RRC would be adversely affected.

Issue #2 - Should an interim injunction be granted as requested?

20 Injunctions may be obtained against the Crown, when constitutional and Charter rights are breached, or when a Minister of the Crown exceeded his or her authority. The Charter is part of the Constitution and therefore an injunction may be granted in cases where Charter rights are infringed by the Crown, subject only to reasonable limits prescribed by law in a free and democratic society.

21 The leading authority for the test to meet to obtain an interim injunction in a constitutional case is the decision of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.J.). A moving party, seeking an interlocutory stay of government activity, must establish each of the following:

- (a) There is a serious issue to be tried; and
- (b) The moving party will suffer irreparable harm prior to trial if the interlocutory relief is not granted; and
- (c) The balance of convenience, taking into account the public interest, favours staying the government activity until the court has disposed of the legal issues.

The case of *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 at 768; and *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at 127-129 also set out similar criteria.

Serious issue to be tried

22 The threshold at this stage is a relatively low one, and the court must make a preliminary assessment and be satisfied that there is a serious issue to be tried and that the matter is not frivolous and vexatious. It is not appropriate or necessary for the court to weigh or make determination of evidence of the validity of government policy at this stage.

23 The Province argues that the Plaintiff has filed no expert evidence from a physician, psychiatrist, psychologist or other professional suggesting that the transition from the RRC to a community based agency will, or is likely to, result in physical or serious psychological stress to Ms. Gray, or to any other RRC resident, which could substantiate the Plaintiff's claims that the transition to a community based agency would result in a deprivation of liberty or security of the person.

24 The Plaintiff has chosen not to file any expert witness reports outlining the psychological stress that would be suffered by Ms. Gray and other residents. The Plaintiff has filed the affidavit of Bernard Webber concerning his brother Cecil, who is 62 years of age and has resided at the RRC for 55 years, and has a mental age of seven and communicates at the level of a three year old. He states that Cecil will be unable to understand or adapt to being uprooted from his home and surrogate family, and his well being and happiness would suffer greatly.

25 Ms. Tessier swore an affidavit concerning her daughter Jane. Jane is 51 years of age and has resided at

the RRC for 46 years. She stated that Jane's quality of life would diminish if she were forced to move from the RRC and that such a move would be traumatic for Jane.

26 James Gray filed an affidavit stating that his sister Ann is 54 years old, has lived at the RRC for 48 years, since five years of age; that the RRC is her home and the residents are her extended family; that she would suffer severe psychological stress and would not be able to receive a standard of care and services in a community based facility comparable to that at the RRC; and that the community based facility would not meet his sister's physical and psychological needs. Mr. Gray offers the same opinion for all other residents of the RRC.

27 While no expert opinion has been filed by the Plaintiff, the opinions of the three individuals, who know and aware of the condition of three of the residents, while not proving that undue stress would be caused to each resident thereby breaching their s. 7 Charter rights, does show that there is a serious issue to be tried and the claim is not frivolous or vexatious. The weight to be given to opinion evidence offered by individuals, who are not qualified as experts in the area, is limited in this proceeding. The Plaintiff's case would be greatly assisted by expert opinion evidence, however, I am satisfied that a serious issue has been raised and that the claim is not frivolous or vexatious. (See *Wynberg v. Ontario*, [2005] O.J. No. 1228 (S.C.J.)).

Irreparable Harm

28 The Defendants argue that the Plaintiff has not shown that she or the other residents would suffer irreparable harm because the Plaintiff has failed to file any expert opinion that the transition from the RRC to a community based facility would irreparably harm residents of the RRC. The Defendants have filed an expert report of Dr. Griffiths, who has extensive involvement in the area of de-institutionalization. She is in favour of community based living arrangements, and she has given the opinion, based on her experience and her review of the literature, that moving residents from institutional facilities to community based facilities is beneficial to residents. Dr. Griffiths' opinion is not related to the specific individuals residing at the RRC, although her report does refer to individuals with severe developmental disabilities, whose disabilities were compounded with a physical disability or psychological condition.

29 Notwithstanding the Province's expert opinion, if the closing of the RRC facility, which has been Ms. Gray's home for the past 48 years, and other residents' home for an average of 35 years, breaches the residents' s. 7 Charter rights, it is not a matter that can be adequately dealt with by way of damages, and as a result, I find that the second component of the test has been met.

Balance of Convenience

30 The Plaintiff must show that the balance of convenience favours the granting of the interim injunction. The Plaintiff has the onus of demonstrating the harm to the public interest if an injunction is not granted. When a private applicant alleges that the public interest is at risk, then harm must be demonstrated since private applicants are presumed to be pursuing their own interest, rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. The applicant must convince the court of the public interest benefits, which would flow from the granting of the release sought. (See *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra*, at pp. 30-36).

31 Special considerations apply when private parties seek to enjoin the actions of public authorities by alleging a constitutional violation. The court should nearly always assume irreparable harm to the public interest in weighing the balance of convenience. At para. 71, the court stated as follows:

... The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

32 In this case, the decision to close the RRC was made by the Ontario Cabinet and the policy of the government has been formulated since the mid-80s. The Province's expert stated that approximately 5,000 of the 6,000 residents residing in institutions have been successfully moved to community based living arrangements since 1980. The Plaintiff and the other residents at the RRC are part of the remaining 1,000 residents residing in institutions in the Province of Ontario. The motion's judge must proceed on the assumption that laws passed by democratically elected bodies are directed to the public good and serve a valid public purpose. The assumption that governments act in the public interest and that the law should be enforced weighs heavily in the balance. The courts will not lightly order that laws duly passed by Parliament are inactive for the public or inoperable in advance of the complete constitutional review, which is always a complex and difficult matter. (See Attorney General of Canada v. Harper, supra).

33 In this case, the Province has not actually passed a new law or regulation, or passed an amendment to the Developmental Services Act. The decision that the Plaintiff seeks to set aside is a decision of Cabinet, which has not been subject to any process or committee review in Provincial Parliament, before becoming an order or direction to be enforced under the Developmental Services Act. The Plaintiff must overcome the assumed benefit to the public interest arising from the continued application of the legislation.

34 The applicant who relies on the public interest must demonstrate that the suspension of the legislation itself would provide a greater public benefit. In this case, it is not the legislation that the Plaintiff seeks to enjoin, but rather, an order or decision of Cabinet. The Plaintiff has failed to show that the balance of convenience favours the Plaintiff given that an interim injunction may last for many years until the class proceeding is finally resolved. If an interim injunction were granted prior to certification of a class action, which was to remain in force until the class action was finally resolved, the interim injunction might be in place for 10 years or more.

35 Twenty-three residents or so are scheduled to move from the RRC by September 30, 2005, and the Province argues that they are aware of and looking forward to a move date and any postponement could result in a serious disappointment to these residents. They argue that to allow private parties to obtain injunctive relief against activities of government authorities, without clear convincing evidence, would greatly compromise the public authorities' task of governing in the public interest.

36 Because of the potential length of the interim injunction and the absence of any expert opinion evidence, outlining the harm and psychological stress that would occur to the Plaintiff and to other residents of the RRC, I find that there is insufficient evidence to conclude that the Plaintiff has shown that a greater public interest would be served, if the interim injunction was granted.

Issue #3 - Should the action be converted to an application for judicial review of the Cabinet decision made on September 9, 2004 to close the RRC?

37 Section 8 of the Judicial Review Procedure Act (the "JRPA"), R.S.O. 1990, c. J.1, provides that where an action for a declaration or injunction, or both, is brought and the exercise of a statutory power is an issue in the action, the court may direct that the action be treated and disposed of summarily, insofar as it relates to the exercise or purported exercise of a statutory power and be transferred to the Divisional Court. The essence of the relief sought by the Plaintiff is an injunction restraining the Province from moving Ms. Gray, or any other RRC resident, from the RRC without the resident's or the guardian's consent, and for an order similar to mandamus, namely directing the government to continue to operate the RRC.

38 The Plaintiff's claim is more thoroughly spelled out in the prayer for relief in the statement of claim, where a mandatory order is sought ordering the Province to continue to operate the RRC in the same manner, as was the case prior to September 9, 2004. The essence of the claim by the Plaintiff is that the decision to close the RRC, made by the Ontario Cabinet on September 9, 2004, amounted to an improper exercise of a statutory power.

39 The decision of the Ontario Cabinet to close the RRC appears to fall within the definition of a statutory power. A statutory power as defined in s. 1 of the JRPA, includes a power or right conferred by or under a statute:

- (a) To make any regulation, rule, by-law or order or to give any other direction having the force as subordinate legislation,
- (b) To excise a statutory power of the decision.

40 The decision of Cabinet is either an order or direction, which is exercised pursuant to the provisions of the Developmental Services Act. A statutory power of decision is defined as a power or right conferred by or under a statute to make a decision deciding or prescribing: a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party; or b) the eligibility of any person or party to receive, or to the continuation of, a benefit or license whether the party is legally entitled thereto or not.

41 In this case, the Cabinet decision deals with the eligibility of Ms. Gray and in fact all other residents of the RRC to continue to receive the benefit of being entitled to reside at the RRC and to continue to receive the services, which have been offered to them for many years.

42 Section 7 of the JRPA states that an application for an order in the nature of mandamus shall be deemed to be an application for judicial review. In this case the ultimate remedy sought is that the Province be ordered to continue to operate the RRC, as well as a declaration that Ms. Gray's and other residents' s. 7 Charter rights have been breached and for an injunction. All of the remedies sought in this interim proceeding are available under s. 2(11) of the JRPA.

43 Section 8 of the JRPA also provides that where a declaration or an injunction is sought the court may direct that the action be treated and disposed of summarily, insofar as it relates to the exercise, refusal to exercise or proposed or purported exercise of such power, as if it were an application for judicial review,

and may order that the hearing on such issue be transferred to the Divisional Court or may grant leave for it to be disposed of in accordance with subsection 6(2) of the JRPA.

44 I find that a transfer of the matter to the Divisional Court is in the interest of justice, as it saves the parties time and expense, it resolves the main issue involving these parties in an expeditious manner by having the main issue decided summarily. Rule 1.04 states that matters are to be resolved to secure a just, most expeditious and least expensive determination of an issue. I therefore order that the action and motion be transferred to the Divisional Court and dealt with summarily pursuant to the provisions of the JRPA.

Issue #4 - Should a stay be granted?

45 I find that the balance of convenience favours granting a stay of any decision by the Province to force any resident of the RRC to transfer from the premises, without their consent, or their legal guardians' consent or the consent of the Public Guardian and Trustee for a period of 90 days, or the earliest date the matter can be heard by the Divisional Court, in a summary manner for the following reasons:

- (i) in view of the seriousness of the issues involved for the residents of the RRC;
- (ii) in view of the submissions of the Public Guardian and Trustee that the rights of the residents who lack guardians and next-of-kin were not duly considered in the manner in which the Ontario Cabinet decision was made to close the RRC;
- (iii) the extreme vulnerability of the many severely mentally handicapped residents with the average mental age of four and who also have severe mental disabilities and other psychological disabilities;
- (iv) the lengthy period of time that the residents have resided at the RRC (39 years on average);
- (v) the fact that the Province only intends to close the RRC by 2009;
- (vi) the fact that the Province only plans to move a relatively small number of residents from the RRC in the next 90 days;
- (vii) the fact that a delay of 90 days will not unduly affect the Province or adversely affect any residents that do not wish to leave;
- (viii) that only those residents of the RRC who do not wish to move from the RRC are affected, as those residents who wish to move to a community living facility may continue to do so;
- (ix) I am satisfied that the public interest is both served by allowing the Plaintiff and other residents the opportunity to have their application for judicial review heard before being forced to leave the RRC; and,
- (x) due to the short period involved minimal inconvenience would be suffered by the Province and no inconvenience would be suffered by any other resident who wished to move.

46 The Province shall have 10 days to make written submissions on costs, the Plaintiff shall have 10 days to respond and the Province shall have 5 days to reply.

R.J. SMITH J.

End of Document

CITATION: CNR v. Chief Chris Plain, 2012 ONSC 7348
COURT FILE NO.: 12-CV-470817-0000
DATE: 20121221

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CANADIAN NATIONAL RAILWAY COMPANY, Plaintiff

AND:

CHIEF CHRIS PLAIN, THE CHIPPEWA OF SARNIA FIRST NATION BAND,
JOHN DOE, JANE DOE and PERSONS UNKNOWN, Defendants

BEFORE: D. M. Brown J.

COUNSEL: H. Pessione, for the Plaintiff

HEARD: December 21, 2012

REASONS FOR DECISION

[1] Canadian National Railway Company moves, on an *ex parte* basis, for interim injunctive relief of the following nature:

(a) an interim injunction restraining, enjoining and prohibiting the Defendants and any person having notice of the order sought herein from, directly or indirectly, by any means whatsoever:

(i) trespassing on the Plaintiff's right-of-way at Milepost 2.37, at the railway crossing at Degurse Drive ("the Degurse Crossing"), on the Plaintiff's St. Clair Industrial Spur rail line (the "Spur Line") located on the Chippewa of Sarnia First Nation Reserve, or anywhere else on the Spur Line;

(ii) physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to impede, restrict or in any way physically interfere with, the Plaintiff's carrying on of its business and in particular its right to operate trains on the Spur Line;

(iii) physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to prevent, impede, restrict or in any way

physically interfere with the removal of any objects from the Spur Line or the maintenance, reconstruction or alteration of the Spur Line;

(iv) threatening or intimidating the Plaintiff's employees, servants, agents or other persons having business with the Plaintiff;

(v) physically interfering with or counselling others to physically interfere with the performance by the Plaintiff of its contractual relations with its employees, servants, agents, customers or other persons having business with the Plaintiff;

(vi) physically obstructing or otherwise impeding, or counselling others to physically obstruct or impede, the movement or operation of the Plaintiff's trains on the Spur Line or anything connected with its railway operations; and,

(vii) creating a nuisance by physically obstructing the Plaintiff from carrying on its railway operations.

(b) an Order requiring the Defendants and any persons having notice of the order sought herein to forthwith remove any and all obstructions placed or created or imposed by them to the Plaintiff's full use of its lands, premises, facilities and equipment on the Spur Line.

CNR also seeks related relief concerning the enforcement of the injunction sought.

[2] This motion was brought *ex parte* on an emergency basis long after the Court had closed this Friday evening.

II. The events alleged

[3] Mr. Greg Curtis, CNR's Regional Superintendent, Operations, swore an affidavit in support of the motion. In the following paragraphs I simply reproduce the evidence provided by Mr. Curtis.

[4] Mr. Curtis stated that CN's St. Clair River Industrial Spur Line is an approximately 14.2 mile single track line that extends from Sarnia, Ontario, to Cortright, Ontario. The Spur line passes through the towns of Corunna and Mooretown, two south western Ontario communities. Sarnia is the largest city on Lake Huron with a mainstay petrochemical production industry. The town of Corunna is known as "Chemical Valley" because of the numerous chemical and other industrial plants in the area, many of which rely on the Spur Line to transport their cargo.

[5] The Spur Line services chemical companies, ethanol plants, plastic plants, fertilizer companies and rail car repair facilities. CN carries many types of freight on the Spur Line between Sarnia and Cortright. CN's clients that use the Spur Line include, among others, Imperial Oil, Terra International (Canada) Inc., Nova Chemicals and St. Clair Ethanol. Each of these companies typically relies on the Spur Line to transport on average 450 cars of cargo (by way of 4 CN and 2 CSX trains) daily, 7 days a week. Materials carried by CN on the Spur Line include: plastics, ethylene, polyethylene, butane, ammonium nitrate, nitric acid, methanol,

manufactured goods, electronics, raw materials, and numerous other types of chemical, industrial and other rail freight, heavily tied to the petrochemical industry.

[6] CN also has operating agreements with CSX Transportation (“CSX”), a U.S. railroad company that operates the largest railroad in the eastern United States. CSX uses the Spur Line on a daily basis as an interchange point for delivery of its rail cars.

[7] Mr. Curtis learned earlier today from Mr. Raymond Currier, CN Police Inspector, Sarnia Yards that:

(a) At or about 9:00 a.m. on Friday, December 21, 2012, he was advised that the Spur Line was being blocked by a number of individuals at Milepoint 2.37, at the railway crossing at Degurse Drive (“the Degurse Crossing”);

(b) Degurse Drive is a paved road in the Chippewa of Sarnia First Nation Reserve. The CN right-of-way for the Spur Line passes through the Reserve at this point;

(c) At approximately 4:55 p.m. Mr. Currier attended at the Degurse Crossing. At that time there were approximately 12 individuals blocking the Spur Line (“the Blockade”). A truck with a snow plow was parked over the two CN tracks, a tent and fire had been erected over the tracks, and a number of lawn chairs were set-up across and beside the tracks, along with fire wood;

(e) The individuals participating in the Blockade refused to identify themselves, but advised him that the reason for the Blockade was to apply pressure on the Federal Government with respect to its recent passing of Bill C-45, and that they did not have any issue with CN;

(f) Mr. Currier requested that the people at the Blockade leave, advised that they were trespassing on CN railway lines, and was advised by them that they were not prepared to leave at that time.

(g) Constable Patrick Nahmabin (Badge #135), a General Duty Constable of the Sarnia City Police, which has jurisdiction over the area in question, attended at the Blockade at approximately the same time, but went off duty at 5:30 p.m. Constable Nahmabin is a member of the Chippewa of Sarnia First Nation Band, (“the Band”) and he recognized members of the Band as the individuals participating in the Blockade.

[8] Mr. Curtis was advised by Brent Ballingall, CN’s Aboriginal Affairs Manager, that at approximately 6:15 p.m. EST he was on a telephone call with Inspector Raymond Currier, CN Police, when the telephone was handed to an individual at the blockade who had refused to identify himself. Mr. Currier was advised by Brent Ballingall that he spoke to this person who identified himself to Brent as Chief Chris Plain, Chief of the Chippewa of Sarnia First Nation Band. Brent requested that Chief Plain leave and have the other protesters leave the Blockade so that CN could carry on with its business, and Chief Plain refused, indicating that he did not

control the people at the Blockade. He indicated to Brent that they would leave at some point but refused to indicate when that would be.

[9] As to the impact of this blockade on CN's operations on the Spur Line, Mr. Curtis deposed that the blockade is preventing the movement of CN's and CSX's trains on the Spur Line. As of approximately 9:00 a.m. on December 21, 2012, CN made the decision, in the interests of public safety, not to run any trains through the Degurse Crossing until a Court Order was obtained, and steps were taken to remove the Blockade. By 8:00 p.m. on December 21, 2012, 2 CN freight trains and 1 CSX freight train that were otherwise scheduled to deliver cargo would have been held at origin. These trains contain a combination of chemical and other industrial products.

[10] Mr. Curtis stated that the Blockade will cause significant economic damage to CN, its customers and others. There is a CSX Transportation rail line in the vicinity, however, it is his understanding that the CSX line does not have the connections or capacity to deliver the traffic carried on the Spur Line. There is no other work-around to avoid the Blockade. Therefore, all the traffic between Sarnia and Cortright will quickly become backlogged. The result will be delays to customers which delays will exceed the time of the actual blockade. This is because start-up problems mount for every hour the Spur Line is blocked - customers simply cannot process two days' worth of traffic in one day, resulting in further backlogs. In turn, this will produce a shortage of empty equipment for subsequent loading, creating a further compounding effect. By the time the backlog is cleared, the costs of these compounded delays will be much greater than the sum of the costs of the individual train delays.

[11] According to Mr. Curtis, CN contracts with its customers to deliver goods within specified periods of time. Many of the shipments are extremely time sensitive, "just-in-time", deliveries and CN's customers have very limited capacity for on-site storage where CN fails to transport cargo as scheduled.

[12] Mr. Curtis deposed that a significant number of CN customers in the "Chemical Valley" area and elsewhere across Canada and the U.S. will be affected by the interruption in rail service. As CN's flow of traffic is disrupted, other service in the CN system will quickly start to decrease due to an imbalance of motive power, crews and freight equipment.

[13] Mr. Curtis stated that the Blockade of CN's train operations will also have a significant impact on CN's employees. CN employs significant numbers of persons in immediate train service as crews, in train and yard operations, as well as in the mechanical department who inspect the trains and persons in the engineering group who are responsible for inspecting and repairing track. A cessation of rail service, beyond even a day, may result in CN laying off some of these employees.

[14] Mr. Curtis expressed the view that the resulting impact on CN's operations will cause irreparable harm to CN and others, including the following harm:

- (a) the layoff of employees, as well as a loss of productivity associated with the disruptions;

- (b) delays in the delivery of commodities and goods and extended yard or line holding of such goods, including chemicals and hazardous commodities, and manufactured goods;
- (c) increased yard congestion at CN's facilities including increased costs of yard crew activities;
- (d) disruption of motive power (engine) cycles from a normal balanced use and routings affecting CN's operations; and,
- (e) loss of revenue to CN and increased costs to CN's customers.

Mr. Curtis deposed that the scale and extent of these losses would be extremely difficult, if not impossible, to quantify in monetary terms.

[15] Mr. Curtis stated that he was authorized on behalf of CN to depose that CN will abide by any order concerning damages that the Court might make if it is found that the granting of the order sought causes compensable damages to the defendants.

III. The general principles

[16] The test for obtaining an interlocutory injunction is well known and was articulated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*:

- (i) The moving party must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test;
- (ii) The moving party must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm, rather than its magnitude; and,
- (iii) The third branch of the test requires an assessment of the balance of inconvenience. In addition to the damage each party alleges it will suffer, the interest of the public must

be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party.¹

[17] On a motion such as the one which CNR has brought, the court must also scrutinize the evidence in light of the duty of an *ex parte* moving party to make full and frank disclosure of all material facts, including putting before the court the arguments the responding party likely would make, to the extent known by the moving party.

[18] Further, the Court of Appeal emphasized, in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*,² that when injunction motions involve aboriginal communities, certain principles must be kept in mind:

- (i) Negotiation, not litigation, is the best way for the country to reconcile the claims of aboriginal communities with the rights of the Crown; and,
- (ii) The rule of law is “highly textured”, with one dimension of the principle involving the respect for minority rights and the reconciliation of aboriginal and non-aboriginal interests through negotiations.

[19] Finally, the protestors in the present case are exercising expressive freedoms enjoyed under the *Canadian Charter of Rights and Freedoms*, but as I examined at length in *Batty v. City of Toronto*,³ expressive rights are not absolute and are subject to reasonable limits.

IV. Analysis

[20] CN brought this motion on an *ex parte* basis. Given that the protestors refused to identify themselves and given the exigent circumstances caused by the blockage, I am prepared to consider the motion on that basis.

[21] I am satisfied that CN has demonstrated a serious issue to be tried. The protestors are trespassing on CN’s Spur Line and are blocking rail traffic. During oral argument counsel showed me a photograph of the blockade of the rail line by a truck with a snow-plough which appeared today in the *Sarnia Observer*. The trespass and obstruction were obvious.

[22] I am also satisfied that CN has demonstrated that it will suffer irreparable harm if an injunction were not granted. Mr. Curtis described the important role played by the Spur Line in servicing local industries and the economic disruption a continued blockade would have. Such widespread economic harm to industries in an area constitutes harm of an irreparable nature.

¹ [1994] 1 S.C.R. 311.

² (2006), 82 O.R. (3d) 721 (C.A.)

³ 2011 ONSC 6862

[23] Turning to the balance of convenience, again CN has demonstrated that unless an injunction restraining the blockade is granted, its operations will be significantly disrupted and third parties will suffer economic harm. The protestors obviously are engaged in a form of expressive activity, but according to the information learned by Mr. Curtis, the protestors do not have a complaint against CN, the property owner; their ire is directed toward the federal Parliament which passed legislation to which they object. Persons are free to engage in political protest of that public nature, but the law does not permit them to do so by engaging in civil disobedience through trespassing on the private property of others, such as CN. Given the alternative locations for expressive conduct open to the protestors, and the economic disruption their expressive activity most probably will have on other industries, the political nature of the message expressed by the protestors carries little weight in the balance of convenience analysis in the particular circumstances of this case.

[24] Moreover, from the information learned by Mr. Curtis, the protest does not involve a claim to aboriginal title or aboriginal rights in connection with the property upon which the protest is taking place. The protest is more in the nature of an expression of opposition by one group of Canadian citizens to legislation which they oppose. As a result, the factors identified by the Court of Appeal in the *Haudenosaunee Six Nations Confederacy Council* play little role in the circumstances of this case.

[25] In sum, the balance of convenience favours CN.

V. Conclusion

[26] For the reasons set out above, I am satisfied that an injunction should issue in the form sought by CN. Since the motion was brought on an *ex parte* basis, the injunction must be limited in duration. I limit the duration of the order until Thursday, December 27, 2012. If CN wishes to continue the order, it may move before me on December 27, 2012, at 10:30 a.m. in courtroom 8-6, 330 University Avenue, Toronto. In addition, I have included in the order a provision entitling any affected person to move to vary this order on 24 hours' notice. I have signed the order.

(original signed by)

D. M. Brown J.

Date: December 21, 2012

Hotel Georgia (OP) Limited Partnership v. Unite Here Local 40

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N. Iyer J. (In Chambers)

Heard: October 3, 2019.

Oral judgment: October 3, 2019.

Docket: S1910928

Registry: Vancouver

[2019] B.C.J. No. 1916 | 2019 BCSC 1744

Between Hotel Georgia (OP) Limited Partnership and 801 West Georgia Ltd. doing business as Rosewood Hotel Georgia, Plaintiffs, and Unite Here, Local 40, John Doe, Jane Doe and Persons Unknown, Defendants

(14 paras.)

Counsel

Counsel for the Plaintiffs: N. Mitha, QC, M. McKinnon.

Counsel for Defendant Unite Here, Local 40: J.L. Quail, A. Tarver.

Oral Ruling Re Application for an Interlocutory Injunction

N. IYER J. (orally)

1 The plaintiffs, Hotel Georgia (OP) Limited Partnership 801 West Georgia Ltd. doing business as Rosewood Hotel Georgia ("the Hotel"), apply for an interlocutory injunction to restrain picketing by Unite Here, Local 40 ("the Union") and unnamed individuals at or near the hotel premises in downtown Vancouver. Specifically, the Hotel seeks the following orders:

- 1) The defendants and any person acting under their instruction and anyone having knowledge of this order are, until trial of this action or further order, hereby restrained and enjoined from:
 - a) using air horns, sirens, blow horns, whistles at or near the Hotel premises;

- b) at or near the Hotel premises using drums or microphones, speakers, megaphones or any other electronic device to amplify sound or to play pre-recorded sounds or pre-recorded music over 75 DBA on an approved sound metre as defined by City of Vancouver bylaw number 6555 emanating at least 6.1 metres from the source of the noise or sound.

2 As well, there are uncontentioned terms regarding its undertaking to pay damages and service of the orders.

3 The Union opposes the application on the basis that the Hotel has not met its burden of establishing that injunctive relief is necessary and appropriate in the circumstances. In the alternative, it argues that if the Hotel has met the test for granting an interlocutory injunction, the terms of such an injunction must be narrower than those sought by the Hotel in order to safeguard the Charter rights of freedom of expression and association inherent in picketing activity.

4 In its submissions the Hotel referred to injunctions granted yesterday by this court respecting picketing by the same union at three other downtown Vancouver hotels. It urges me to make the same order with respect to noise as was made in those cases. In my view the order made yesterday is of limited assistance. That is because those cases involved impeding persons and vehicles, activity that is not an issue in this case, and different hotel locations. What amount and kind of sound attract injunctive relief are necessarily location specific.

5 There is no real dispute between the parties about the public legal principles. Both agree that lawful picketing is constitutionally protected under ss. 2(b) and 2(d) of the Charter. Both also agree that the onus is on the party seeking an interlocutory injunction to establish that there is a serious question to be tried and that the balance of convenience favours granting the relief sought. In British Columbia the question of irreparable harm is part of the balance of convenience analysis.

6 In this case the underlying alleged tort is nuisance. That means the Hotel must satisfy me that its nuisance claim is not frivolous and that there is a serious question as to whether the Union's conduct amounts to a non-trivial and unreasonable interference with its use and enjoyment of its property. See *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13; *Suzuki v. Munroe*, 2009 BCSC 1403.

7 There is no question that noise can constitute a nuisance at law. I am satisfied based on the affidavit evidence tendered by the Hotel that there is a serious question to be tried as to whether the noise generated by the picketing amounts to the tort of nuisance. I reach that conclusion taking into account the threshold that the Supreme Court of Canada has established for this assessment in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

8 The second part of the test for injunctive relief requires me to consider the balance of convenience, including irreparable harm, to determine whether an injunction is necessary and if so, what terms would minimize the harm would compromising the Union's right to picket effectively.

9 The Hotel tendered evidence of an incident on September 27 in and a picketer injured a hotel security guard by blowing a long blow horn directly into his ear. It also tendered evidence of decibel readings

taken by a private investigator on a phone app at various times of day on each of September 24, 25, 26 and 27, at distances of either 60 to 10 feet or 30 feet away from the picketing.

10 The applicable noise bylaw prohibits continuous sound exceeding 70 decibels, and the Union provided evidence that sounds above 85 decibels are considered to be harmful. By my rough calculation, the readings show that the sound levels exceeded 85 decibels 83 percent of the time. The evidence establishes that apart from some breaks or lulls, the noise from the picketing occurs from roughly 7:00 a.m. to 7:00 p.m. daily. Further, there is evidence that the Vancouver Police Department asked the picketers to stop using sirens because of the potential for confusion and possible safety risks.

11 A union is entitled to bring economic pressure to bear on an employer during a lawful strike, including by dissuading customers from using the employer's services. For example, see the *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 SCR 733, at para. 36. However, those means of dissuasion are not unlimited. In my view based on the evidence I have summarized, the Hotel has satisfied its burden of demonstrating that a carefully crafted and limited interlocutory injunction is necessary in these circumstances.

12 The Union argued that the Hotel's application before the Labour Relations Board is "an effective alternative remedy" because if successful, that application would make the strike illegal and consequently the picketing would cease. However, the Union's submissions are not due until Monday, and it is not known when the Board will render a decision. In these circumstances the application to the Board is not an effective alternative remedy.

13 I conclude that an interlocutory injunction is warranted in this case. Bearing in mind counsel's helpful submissions about the terms of an appropriate order, I order as follows:

- 1) The defendants and any persons acting under their instruction and anyone having knowledge of this order are, until the trial of this action or the conclusion of the current strike or lock out hereby restrained and enjoined from:
 - a) using sirens at or near the Hotel premises;
 - b) at or near the Hotel premises using drums, air horns, blow horns, whistles, speakers, megaphones or any other electronic device to amplify sound or to play pre-recorded sounds or pre-recorded music over 75 DBA on an approved sound metre as defined by the City of Vancouver bylaw number 6555 emanating at least 6.1 metres from the source of the noise or sound;
- 2) That the plaintiff 801 West Georgia Ltd. doing business as Rosewood Hotel Georgia has provided the court with an undertaking as to damages;
- 3) That service of any order of the court may be made by:
 - a) delivering a copy to the Union by mail, courier, electronic mail or by facsimile to the office of the Union located at 1812-1177 Hastings Street West, Vancouver, British Columbia;
 - b) delivering a copy to any legal counsel acting for the Union by mail, courier, electronic mail or facsimile;

Hotel Georgia (OP) Limited Partnership v. Unite Here Local 40

- c) delivering a copy of the order to persons picketing at or near the premises;
- d) reading said app order loudly to persons picketing at or near the premises; or
- e) as the court so orders.

14 The plaintiff shall have its costs of this application in the cause.

N. IYER J.

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MacMillan Bloedel Ltd. v. Simpson

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

1996: April 22 / 1996: August 22.

File No.: 24437.

[1996] 2 S.C.R. 1048 | [1996] 2 R.C.S. 1048 | [1996] S.C.J. No. 83 | [1996] A.C.S. no 83

Greenpeace Canada and Valerie Langer, appellants; v. MacMillan Bloedel Limited, respondent, and Shiela Simpson, Valerie Langer, Bonnie Glambeck, James Robinson, Gilles Blanchet, Daniel Carbotte, Marie Michajlowycz, Willie Sport, Lisa Humphreys, Dan Lewis, Carl Hinke, Mike Mullins, Chris O'Gorman, Bill Joyce, Heidi Dorosh, Marek Czuma, Tammy Chabot (aka Tammy Kinlock), Daniel Alexander Kirslake, William Robinson Cook, Henry George Adam Trott, John Jared Irwin, John Doe, Jane Doe and Persons Unknown, defendants, and The Attorney General of British Columbia, intervener.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Injunction — Interim injunction — Non-parties — Company granted interim injunction against protesters interfering with its logging operations — Whether courts have jurisdiction to make orders binding on non-parties — If so, whether such orders can be made against persons named only as "John Doe, Jane Doe and Persons Unknown" — Whether appropriate to include in such orders provisions authorizing police to arrest and detain strangers to litigation.

The respondent, which is engaged in logging operations on its properties in the Clayoquot Sound area of Vancouver Island, brought an action in the B.C. Supreme Court in 1991 to restrain the protesters from blocking the roads on which it trucked its logs, seeking damages for trespass, nuisance, intimidation, interference with contractual relations and conspiracy, as well as injunctive relief. The respondent also obtained an ex parte order enjoining "all persons having notice" of the order from impeding its logging operations. In a series of subsequent applications the order was amplified, refined, and extended. In 1993, the respondent was granted an interim injunction -- the order in issue in this appeal -- prohibiting the named defendants, as well as "John Doe, Jane Doe and Persons Unknown" and "all persons having notice of th[e] order" from engaging in conduct which interfered with its operations at specified locations. In particular, the injunction barred members of the public from blocking a bridge and authorized the police to remove offenders. The majority of the Court of Appeal upheld the order, holding that the B.C. Supreme Court, as a court of inherent jurisdiction, had jurisdiction to make orders binding on non-parties and that the use of such power was justified to preserve the respondent's property rights in the face of mass obstruction.

Held: The appeal should be dismissed.

The mere fact that conduct may be characterized as criminal does not deprive a person whose private rights are affected from seeking relief in the civil courts. More specifically, where criminal conduct affects property rights, the person so affected may invoke the equitable jurisdiction of the court to obtain an injunction prohibiting the conduct. Thus the fact that the conduct of blocking the roads can be characterized as criminal does not deprive the British Columbia Supreme Court of the right to grant an injunction against potential offenders in a civil action.

Courts have jurisdiction to make orders binding on persons who are not parties to the action. Such orders are enforceable on the long-standing principle that persons who are not parties to the action, but who violate an order of the court, may be found guilty of contempt for interfering with justice. Since members of the public can be held in contempt for having disobeyed an injunction, they must first be apprised of the existence and terms of the order and be given an opportunity to comply. It is also desirable that the order's terms speak of the duty of non-parties to respect it.

Finally, it is necessary that the orders be carefully worded and constrained to ensure that they are fair and not unduly broad. All these requirements were met in this case.

The use of the expressions "John Doe, Jane Doe and Persons Unknown" in the present action does not invalidate the order. These expressions are surplusage as a person who is not a party to an action is bound to respect an order made in the action on pain of being found in contempt of court. This was the procedure used to enforce the order at issue. Since none of the protesters was charged or sued as a party to the action, it is unnecessary to decide whether, as a matter of pleading, the use of these terms in the style of cause could validly engage members of the public served with the writ.

The provision authorizing the police to arrest and detain persons breaching the injunction does not vitiate the order. The inclusion of police authorization appears to follow the Canadian practice of ensuring that orders which may affect members of the public clearly spell out the consequences of non-compliance.

The fact that the respondent did not pursue the main action against the named defendants is not a basis for invalidating the order. The respondent was entitled to claim other relief allowed by law.

Cases Cited

Referred to: Weber v. Ontario Hydro, [1995] 2 S.C.R. 929; Robinson v. Adams (1924), 56 O.L.R. 217; Gouriet v. Union of Post Office Workers, [1978] A.C. 435; Hurtig v. Reiss, [1937] 3 W.W.R. 549; Boyce v. Paddington Borough Council, [1903] 1 Ch. 109, rev'd [1903] 2 Ch. 556, rev'd [1906] A.C. 1; Marengo v. Daily Sketch and Sunday Graphic, Ltd., [1948] 1 All E.R. 406; Iveson v. Harris (1802), 7 Ves. 251, 32 E.R. 102; Attorney-General v. Times Newspapers Ltd., [1991] 2 W.L.R. 994; In re Supply of Ready Mixed Concrete, [1991] 3 W.L.R. 707; Seaward v. Paterson, [1897] 1 Ch. 545; Bartle & Gibson Co. v. Retail, Wholesale and Department Store Union, Local 580, [1971] 2 W.W.R. 449; International Longshoremen's Association, Local 273 v. Maritime Employers' Association, [1979] 1 S.C.R. 120; Attorney General v. Newspaper Publishing plc, [1987] 3 All E.R. 276; Sandwich West (Township) v. Bubu Estates Ltd. (1986), 30 D.L.R. (4th) 477; Ontario Hydro v. Johnson (1985), 1 C.P.C. (2d) 234; Morgentaler v. Wiche, [1989] O.J. No. 2582 (QL); Ontario (Attorney General) v. Dieleman (1994), 20 O.R. (3d) 229; Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied

Workers (1977), 80 D.L.R. (3d) 634; Montres Rolex S.A. v. Balshin, [1990] 3 F.C. 353, aff'd [1993] 1 F.C. 236; United States v. Hall, 472 F.2d 261 (1972); Madsen v. Women's Health Center, Inc., 114 S.Ct. 2516 (1994); New York State National Organization for Women v. Terry, 961 F.2d 390 (1992); Dayton Women's Health Center v. Enix, 589 N.E.2d 121 (1991); Roe v. Operation Rescue, 919 F.2d 857 (1990); Cornell University v. Livingston, 332 N.Y.S.2d 843 (1972); Jackson v. Bubela and Doe, [1972] 5 W.W.R. 80.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, s. 11. Law and Equity Act, R.S.B.C. 1979, c. 224, s. 36.

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Sharpe, Robert J. Injunctions and Specific Performance, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf updated December 1995, Release 3).

APPEAL from a judgment of the British Columbia Court of Appeal (1994), 96 B.C.L.R. (2d) 201, 118 D.L.R. (4th) 1, 93 C.C.C. (3d) 289, [1994] 10 W.W.R. 705, 50 B.C.A.C. 100, 82 W.A.C. 100, 32 C.P.C. (3d) 11, affirming a decision of Hall J. (1993), 106 D.L.R. (4th) 556, granting an interim injunction. Appeal dismissed.

Gregory J. McDade, Q.C., David Boyd and J. Demarco, for the appellant Greenpeace Canada. A. Cameron Ward, for the appellant Valerie Langer. John J. L. Hunter, Q.C., and Peter G. Voith, for the respondent. Michael Frey, for the intervener.

Solicitor for the appellant Greenpeace Canada: Gregory J. McDade, Vancouver. Solicitor for the appellant Valerie Langer: A. Cameron Ward, Vancouver. Solicitors for the respondent: Davis & Company, Vancouver. Solicitor for the intervener: The Ministry of the Attorney General, Victoria.

The judgment of the Court was delivered by

McLACHLIN J.

1 This case raises the issue of the power of the courts to grant injunctions against members of the public engaged in protests that interfere with the private rights of others. Can the courts make orders against unidentified persons not named in the action or named only in proxy as "Jane Doe" and "John Doe"? Or must the persons enjoined be sued and named before an order is enforceable against them?

I. Facts

2 The appeal arises out of protests against the logging operations of the MacMillan Bloedel Forest Products Company on Vancouver Island in the Clayoquot Sound region of British Columbia. MacMillan Bloedel was engaged in harvesting trees on its properties in the Bulson Creek Watershed. Following a government decision to permit certain harvesting of old-growth forest, the logging of the Pacific Rain Forest in which MacMillan Bloedel and others were engaged became the focus of controversy. People opposed to the harvest of the forests mounted protests. One form of protest was to block public roads in order to prevent the logging trucks from sending cut logs out of the forest area.

3 MacMillan Bloedel took legal action to end these blockades. On September 17, 1991, it brought an action to restrain the protesters from blocking the roads on which it trucked its logs. It named as defendants the appellant Valerie Langer, four other named individuals, and "John Doe, Jane Doe and Persons Unknown", seeking damages for trespass, nuisance, intimidation, interference with contractual relations and conspiracy, as well as injunctive relief.

4 The day after its action was launched, MacMillan Bloedel proceeded to apply for and obtain an ex parte order enjoining "all persons having notice" of the order from impeding MacMillan Bloedel's logging operations on the Bulson Creek Watershed. In a series of subsequent applications the order was amplified, refined, and extended both in duration and to include other sites: Spencer J. added arrest and detention provisions on September 20, 1991; Bouck J. converted the interim injunction to an interlocutory injunction on September 25, 1991; Hamilton J. expanded the geographical scope of the injunction on June 30, 1992; following further protest activities in July 1992, Tysoe J. granted an interim injunction of one year's duration covering yet more territory; and on July 16, 1993, Esson C.J.S.C. extended the injunction to August 31, 1993. Public demonstrations escalated from July 5, 1993 onwards, with 56 persons ultimately being charged with contempt. Their trial was set for August 30, 1993.

5 On August 26, 1993, the application which gives rise to the order under appeal was brought. It came on before Hall J. He granted an interim injunction prohibiting the named defendants, as well as "John Doe, Jane Doe and Persons Unknown" and "all persons having notice of th[e] Order" from engaging in conduct which interfered with MacMillan Bloedel's operations at specified locations: (1993), 106 D.L.R. (4th) 556. He also extended the injunctions granted by Esson C.J.S.C. and Hamilton J. to August 31, 1994. The appellants appealed from this order. The British Columbia Court of Appeal dismissed the appeal, Wood J.A. dissenting: (1994), 96 B.C.L.R. (2d) 201, 118 D.L.R. (4th) 1, 93 C.C.C. (3d) 289, [1994] 10 W.W.R. 705, 50 B.C.A.C. 100, 82 W.A.C. 100, 32 C.P.C. (3d) 11 (hereinafter cited to B.C.L.R.). The appellants now appeal to this Court.

6 The injunction barred members of the public from blocking the Kennedy River bridge and authorized the police to remove offenders in the following terms:

AND THIS COURT FURTHER ORDERS that any persons attending at or near the Kennedy River Bridge during working hours of the Plaintiff and while vehicles are travelling along the travelled roadway in such area shall situate themselves off that roadway and shall not attend within fifteen feet of that roadway;

AND THIS COURT FURTHER ORDERS that any peace officer be authorized to arrest and remove any person who the peace officer has reasonable and probable grounds to believe is contravening or has contravened the provisions of this order;

7 The police arrested over 800 individuals during the summer and fall of 1993 for violating the interlocutory orders obtained by MacMillan Bloedel. The vast majority of the people arrested were not named as defendants in the Statement of Claim. Six hundred and twenty-six people were convicted of criminal contempt of court and sanctioned by fines of up to \$3,000 and jail terms of up to 60 days. The individuals arrested came from all parts of Canada and a number of other countries. The evidence establishes that before arresting a protester, the police followed the practice of handing the injunction to

the protester and then reading its contents to him or her. Upon this being done, most protesters peacefully left the blockade.

8 Throughout this period, the Attorney General of British Columbia followed a policy of not laying criminal charges against environmental groups or individuals engaged in civil disobedience, leaving it instead to the affected private parties to seek civil relief through the courts.

9 MacMillan Bloedel has not brought the main action on for trial. Its counsel did not suggest that it ever would.

The government policy has changed and the protests have died down. The injunctions have long since expired.

II. Judgments of the British Columbia Courts

10 Hall J. granted the order in terms similar to previous orders made in this matter by other justices of the Supreme Court of British Columbia.

11 The Court of Appeal upheld the order, Wood J.A. dissenting. The majority of the Court of Appeal was satisfied that the Supreme Court, as a court of inherent jurisdiction, had jurisdiction to make orders binding on non-parties and that the use of such power was justified to preserve the respondent's property rights in the face of mass obstruction. Wood J.A. dissented on the ground that court orders are binding only on named parties to the action, and that the epithets "John Doe, Jane Doe and Persons Unknown" did not make members of the public parties to the action. In his view, the proper remedy when mass action threatens to overrun private rights is for the Attorney General to enforce the criminal law.

III. The Issues

12 The appellants make one main point: the court, in the context of civil litigation between private parties, does not have the power to grant an injunction which binds non-parties or the general public. Nor can the problem be cured, in their view, by the use of terms like "John Doe", "Jane Doe" or "Persons Unknown". The appellant Valerie Langer argues that if the courts have the power to make orders against non-parties, it is not appropriate to include provisions authorizing the police to arrest and detain strangers to the litigation. Three issues, therefore, arise:

- (1) Do the courts have the power in the context of civil litigation between private parties to enjoin non-parties or members of the public from designated conduct?
- (2) If so, can such orders be made using terms like "John Doe" or "Jane Doe" or "Persons Unknown"?
- (3) If the courts can make such orders, is it appropriate to include in them provisions authorizing the police to arrest and detain strangers to the litigation?

IV. Analysis

A) Do the Courts Have Jurisdiction to Make Orders Binding on Non-Parties?

13 This case, like most, rests on a fundamental conflict. The conflict is between the right to express public dissent on the one hand, and the exercise of property and contractual rights on the other. Thus the

appellants are wrong in asserting that the orders in question are nothing more than "government by injunction" aimed at suppressing public dissent. The respondent is equally wrong in asserting that this case has nothing to do with the public expression of dissenting views and pertains only to private property. This case is about both. In a society that prizes both the right to express dissent and the maintenance of private rights, a way to reconcile both interests must be found. One of the ways this can be done is through court orders like the one at issue in this case. The task of the courts is to find a way to protect the legitimate exercise of lawful private rights while preserving maximum scope for the lawful exercise of the right of expression and protest.

14 At issue in this case is the power of the courts to use an injunction granted in private litigation to regulate or curtail public conduct. The protesters, members of the public, were blocking public roads. The injunction ordered them not to do so and provided for their arrest if they persisted. The submission of the appellant Greenpeace comes down to this: private parties cannot use the courts to curtail the activity of members of the public because private litigation is confined to named, identifiable parties. If members of the public violate the law, disturb the peace or interfere with the lawful exercise of private rights, it is a matter for the Attorney General to prosecute under the criminal law or seek an injunction in the public interest.

15 It is accepted by all that the British Columbia Supreme Court, as a court of inherent jurisdiction, possesses the power required to maintain the rule of law. More specifically, the broad power of the Court to grant interlocutory injunctions is confirmed by the Law and Equity Act, R.S.B.C. 1979, c. 224, s. 36, which provides for their grant "in all cases in which it appears to the court to be just or convenient that the order should be made ... on terms and conditions the court thinks just". Relying on these powers, MacMillan Bloedel argues that where a court of inherent jurisdiction has jurisdiction over a dispute or lis by reason of private litigation, it can make all orders necessary to preserve the rights of the parties, including orders against unknown persons where this is necessary to make the relief effective. Citing this Court's recent decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, MacMillan Bloedel argues that if the rule of law is to be maintained, it must not be deprived of an effective remedy. MacMillan Bloedel contends that the sole purpose of the injunction at issue was to remove the physical blockades that prevented it from exercising the property rights asserted in the action. Having made out a prima facie case that its property rights were being violated, MacMillan Bloedel takes the position that it was entitled to an interim order protecting those rights. An order going merely against named parties, i.e., those who had blocked the road in the past, would be ineffective because new people were arriving daily to participate in the blockades. Since the only effective way to protect its rights was, in MacMillan Bloedel's submission, by means of an order directed at unknown persons, it contends that the British Columbia Supreme Court had jurisdiction to grant the order sought.

16 Against this position, the appellants raise two arguments. The first is that the courts have no inherent jurisdiction to make orders against members of the public in criminal law matters. The second is that the courts have no jurisdiction to make orders against unnamed parties. I will consider each in turn.

(1) The Criminal Law Argument

17 The appellant Langer argues that there was no need for the B.C. Supreme Court to assume jurisdiction over unknown parties because an alternative remedy was available. MacMillan Bloedel's "most obvious" remedy, she submits, was to "prevail upon law enforcement officials to enforce the Criminal Code".

18 On a practical level, this remedy offered little assistance to MacMillan Bloedel in the summer of 1993. The Attorney General of British Columbia had a specific policy not to lay criminal charges against environmental groups engaging in civil disobedience, but to leave it to affected parties to seek injunctive relief. MacMillan Bloedel submits that it was precisely because the Attorney General was not acting that it needed the protection of an interim injunction.

19 Underlying the argument that the proper remedy lay in the criminal law is the proposition that, as a matter of law, it is for the Attorney General alone to decide whether and how to deal with conduct of a criminal nature. If the Attorney General decides that it is not in the public interest for the government to act, it is not open to a private party to enlist the aid of the courts to stop the conduct. The appellant Langer relies on *Robinson v. Adams* (1924), 56 O.L.R. 217 (C.A.), and *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435 (H.L.), in support of this contention.

20 I cannot accept the appellant's position. The mere fact that conduct may be characterized as criminal does not deprive a person whose private rights are affected from seeking relief in the civil courts. *Robinson* and *Gouriet* deal with the narrower issue whether a person who asserts no private right has standing to advance the public interest without first obtaining the consent of the Attorney General. Where, as here, a private litigant's rights are affected by criminal conduct, there is no question that the litigant has such standing: *Sharpe, Injunctions and Specific Performance* (2nd ed. 1995 (loose-leaf)), c. 4; *Robinson*, supra; *Gouriet*, supra. More specifically, where criminal conduct affects property rights, the person so affected may invoke the equitable jurisdiction of the court to obtain an injunction prohibiting the conduct: *Sharpe*, supra, at p. 3-32; *Hurtig v. Reiss*, [1937] 3 W.W.R. 549 (Man. C.A.). *Sharpe* cites the following passage from *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109, at p. 114, rev'd, [1903] 2 Ch. 556 (C.A.), rev'd [1906] A.C. 1 (H.L.), as a classic statement of the right of a private individual to seek relief from criminal conduct in the civil courts:

A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. [Emphasis added.]

Section 11 of the Criminal Code, R.S.C., 1985, c. C-46, codifies this principle in unqualified terms: "No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence".

21 I conclude that the fact that the conduct of blocking the roads can be characterized as criminal does not deprive the British Columbia Supreme Court of the right to grant an injunction against potential offenders in a civil action.

(2) The Problem of Unidentified Persons

22 The second jurisdictional attack on the interim injunction is the assertion that the courts do not have the jurisdiction to make orders binding on non-parties. On this submission, an order can bind only parties

named in the action. Wood J.A. accepted this argument. In his view, it is "a principle fundamental to our notion of justice" (p. 231) that "the single-minded purpose of the modern day writ of summons and its ancestors has been to give the defendant notice of the proceedings against him, by virtue of which notice the courts then had jurisdiction to grant relief at the behest of the plaintiff" (pp. 231-32). Relying on English authority, Wood J.A. concluded that, absent a writ directed against an individual personally, the court lacks jurisdiction to make an order against that person.

23 I propose to consider this argument in two ways: first, from the perspective of the authorities, and second, from the perspective of the effect that such a rule would have on maintaining the rule of law in Canadian society. I turn first to the authorities. I conclude that while the relevant principles have been articulated somewhat differently in England and Canada, the practical effect is the same: in both countries, non-parties who violate injunctions may be found in contempt of court. Hence, non-parties may be seen as being, if not technically bound by the order, bound to obey the order. The same rule, it will be seen, has been accepted in other countries with legal systems similar to our own.

24 It is important at the outset to keep one distinction firmly in mind, as the failure to do so led to some confusion in the submissions before us. I refer to the distinction between the question whether an order may refer to classes of unnamed persons, and the quite separate question whether an order can bind persons not party to the litigation.

The first is a procedural question, a matter of pleading. The second is the real question raised by the dissenting opinion of Wood J.A. It is with the second question that I am concerned at this point.

25 The argument that the jurisdiction of the courts is confined to parties named and served in the action rests on the notion that the courts can act only in personam; that is, against named individuals. In *Marengo v. Daily Sketch and Sunday Graphic, Ltd.*, [1948] 1 All E.R. 406 (H.L.), Lord Uthwatt cited *Iveson v. Harris* (1802), 7 Ves. 251, 32 E.R. 102, at p. 104, for the proposition that a court is not competent "to hold a man bound by an injunction, who is not a party in the cause for the purpose of the cause". He went on to say (at p. 407):

The reference to servants, workmen, and agents in the common form is nothing other than a warning against wrongdoing to those persons who may by reason of their situation be thought easily to fall into the error of implicating themselves in a breach of the injunction by the defendant. There its operation, in my opinion, ends.

The traditional English rule thus appears to be that only named parties can be bound by a court order. While general terminology referring to others may be included in the order, this is done only to capture the idea that the named party -- often a corporation -- is enjoined from committing the specified act both directly and through the actions of others, such as servants and agents, whom it may direct. The general terminology also serves to provide a warning to third parties who might otherwise implicate themselves in a breach of the order.

26 If third parties are not bound by an order, it would seem logically to follow that they cannot personally be held responsible for breaching it. Nevertheless, the English courts accept that non-parties may be held guilty of contempt for violating court orders. The House of Lords has recently confirmed that a person not named in an order may be held in contempt of court for doing the act prohibited by the order, even when acting independently and not aiding or abetting the named defendant: *Attorney-General v. Times*

Newspapers Ltd., [1991] 2 W.L.R. 994 (H.L.); see also *In re Supply of Ready Mixed Concrete*, [1991] 3 W.L.R. 707 (C.A.), at p. 718. In this sense, it may be argued that the English authorities, despite an apparent rule to the contrary, in fact hold that injunctions are binding on persons other than the parties to the action.

27 How is the fact that non-parties can be found guilty of violating court orders and sent to prison therefor to be reconciled with the assertion of the English authorities that only parties to the litigation can be bound by court orders? On the level of theory, these apparently contradictory positions are reconciled by the distinction between being bound by an injunction as a party to the action and being guilty of contempt of court by obstructing justice. Only parties are "bound" by the injunction. But anyone who disobeys the order or interferes with its purpose may be found to have obstructed the course of justice and hence be found guilty of contempt of court. Thus in *Seaward v. Paterson*, [1897] 1 Ch. 545 (C.A.), Lindley L.J. wrote (at p. 555):

A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing.

28 On the level of practice, the distinction seems to be a distinction without a difference since in either case, a person not named in the action who violates the injunction may be brought before the courts, tried, and penalized. The difference vanishes in the Canadian context where the practice is to charge non-parties with contempt rather than for violating the injunction. In the case at bar, for example, the 626 people convicted under the various injunctions were convicted not of violating the injunction, but of criminal contempt.

29 It thus emerges that Wood J.A. correctly asserts the existence of the English rule that injunctions bind only parties to the action. The assertion, however, is of little consequence because third parties who violate or interfere with the injunction may be prosecuted for contempt of court. The case at bar does not raise the issue whether non-parties are bound by an injunction in the technical sense discussed by Wood J.A.; it does raise the issue whether non-parties can be found in contempt of court for violating an injunction. On the English authorities, the answer to that question is indubitably affirmative.

30 Canadian judges considering the problem of mass violations of private rights have made less of the distinction between being bound by an injunction (confined to parties) and being bound to obey an injunction (not confined to parties). In *Bartle & Gibson Co. v. Retail, Wholesale and Department Store Union, Local 580*, [1971] 2 W.W.R. 449 (B.C.C.A.), Tysoe J.A., considering a submission that non-parties should not be described in an order, stated (at p. 455):

I find it a little difficult to understand why, if it is true -- and it is, of course, quite true that persons who, with knowledge of an order, take any steps to assist in contravening it, may be proceeded against for contempt of court -- why the order should not provide that it covers somebody who, having knowledge of the order, disobeys it.

A similar recognition that anyone who violates a court order, whether a party or not, may be charged with contempt of court seems to underlie the comment of Estey J., speaking for this Court in *International Longshoremen's Association, Local 273 v. Maritime Employers' Association*, [1979] 1 S.C.R. 120, at p. 144:

However [language enjoining non-parties] has, for many years, been adopted in these injunctions ... no doubt for the good reason that it makes the impact and sense of the order clear to all those likely to be affected thereby and, in any event, such wording can hardly be said to harm any of the persons in law affected by the order. [Emphasis added.]

In other words, since persons other than named parties may be affected by the order, and be held in contempt for violating it, it makes good sense to use language which alerts those people to that risk. More recent English authority suggests that courts there, too, may be coming to see the practical value of such an approach. Thus, in *Attorney General v. Newspaper Publishing plc*, [1987] 3 All E.R. 276 (C.A.), at pp. 314-15, Balcombe L.J. commented that in an appropriate case it may be "preferable" for the court to make its initial protective order in terms which make it clear to members of the public who may be affected by the order that they also are required to obey it.

31 It may be confidently asserted, therefore, that both English and Canadian authorities support the view that non-parties are bound by injunctions: if non-parties violate injunctions, they are subject to conviction and punishment for contempt of court. The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey. The only issue -- and one which has preoccupied courts both in England and, to a lesser extent, here -- is whether the wording of the injunction should warn non-parties that they, too, may be affected by including language enjoining the public, or classes of the public, from committing the prohibited acts. On this point I share the view of Tysoe J.A. in *Bartle & Gibson*, supra, and Estey J. in *International Longshoremen's Association*, supra: if members of the public may be bound to respect court orders in private suits on pain of being held in contempt, it seems appropriate that the order apprise them of that fact.

32 It remains to consider a final argument raised by the appellants. Underlying both their submissions and the dissenting reasons of Wood J.A. is the suggestion that it is improper to use private litigation for the sole purpose of obtaining an injunction to constrain public action. Hence the emphasis on the fact that MacMillan Bloedel's main action against the named defendants has never proceeded to trial. Having given this concern my most serious consideration, I conclude that it provides no basis for invalidating the order made in this case. MacMillan Bloedel sued and named as defendants five persons identified at the first blockades. MacMillan Bloedel was entitled to claim against them such relief as the law allows. Although it contented itself with obtaining interim injunctions, MacMillan Bloedel could have proceeded to trial to obtain permanent injunctions and damages against them. The fact that it chose not to pursue the fullest remedy available is not a basis for denying it any other relief allowed by law. The interlocutory injunctions obtained against the named defendants for blocking the logging roads also bound members of the public at large. There is nothing new in this. Canadian courts have for decades followed the practice of issuing orders directed at prohibiting interference with private property rights, which orders affect not only the named parties but also the general public.

33 For the purposes of this case, it is unnecessary to go further. I note, however, that where a final injunction is in issue, some cases suggest that caution should be exercised in including non-parties in the terms of the order: *Sandwich West (Township) v. Bubu Estates Ltd.* (1986), 30 D.L.R. (4th) 477 (Ont. C.A.); see also *Marengo*, supra. Subject to this caveat and other considerations bearing on the special circumstances of the case, the proposition that the courts possess inherent jurisdiction to issue injunctions to restrain large-scale public action violative of private rights enjoys wide recognition. See the following: *Ontario Hydro v. Johnson* (1985), 1 C.P.C. (2d) 234 (Ont. H.C.); *Morgentaler v. Wiche*, [1989] O.J. No.

2582 (H.C.); Ontario (Attorney General) v. Dieleman (1994), 20 O.R. (3d) 229 (Gen. Div.), at pp. 333-36; Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers (1977), 80 D.L.R. (3d) 634 (Man. C.A.), at p. 644; Montres Rolex S.A. v. Balshin, [1990] 3 F.C. 353 (T.D.), at pp. 365-67, aff'd with a variation of the order, [1993] 1 F.C. 236; United States v. Hall, 472 F.2d 261 (5th Cir. 1972), at pp. 265-66; Madsen v. Women's Health Center, Inc., 114 S.Ct. 2516 (1994); New York State National Organization for Women v. Terry, 961 F.2d 390 (2d Cir. 1992), at pp. 397-98; Dayton Women's Health Center v. Enix, 589 N.E.2d 121 (Ohio Ct. App. 1991), at pp. 125-26; Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990), at p. 871; see also Cornell University v. Livingston, 332 N.Y.S.2d 843 (Sup. Ct. 1972), at p. 848.

34 Having considered the authorities, I turn to the practical consequences of ruling that courts cannot issue injunctions which non-parties are required to respect. Wood J.A., having concluded that the courts have no such authority, was required to face this problem. He wrote (at p. 248):

Can the courts stand by and watch helplessly when the private rights of the individual are overrun by the mob? Should we turn our backs on the person who looks to us for help in such circumstances over an issue so apparently technical as jurisdiction? If there were no alternative solution to that individual's dilemma, I would be quick to answer "no" to both questions. The progress of the law is an ever-evolving journey which must respond to new challenges lying within its path. Much of the jurisdiction which the Supreme Court exercises today was born out of just such necessitous circumstances.

However, in my view there is an alternative solution. It lies in the proper discharge of the obligations which attach to the office of the Attorney General.

Wood J.A. went on to state that it is "the responsibility of the Attorney General as the chief law enforcement officer ... to see to it that the criminal law is enforced" (p. 249).

35 Every citizen would endorse these words. Yet, as this case demonstrates, to state the obligation of the Attorney General is not to ensure that it will be discharged in such a way as to provide the required protection to citizens injured by the conduct of others. It is to fill this gap that the equitable remedy of injunctions -- injunctions which not only the parties but also all others must respect on peril of being found in contempt of court -- has developed.

36 What then of the other side? What are the dangers of empowering the courts to make orders to protect private interests which all must obey on pain of contempt? It is fundamental that no state founded on the rule of law can permit members of the public to be detained and punished for violating an order of which they are ignorant. If members of the public are to be charged with obstruction of justice for having disobeyed an injunction, they must first be apprised of the existence and terms of the order and be given an opportunity to comply. That is precisely what was done in enforcing the injunctions here. Before a protester was arrested, he or she was handed a copy of the order and its terms were read to him or her. The protester was then asked to quit the blockade. Most complied. Only those who refused were arrested. It is also desirable, as this Court suggested in *International Longshoremen*, supra, that the order's terms speak of the duty of non-parties to respect it. This, too, was done here. Finally, it is necessary that the orders be carefully worded and constrained to ensure that they are fair and not unduly broad. This requirement, too, was met in the case at bar. Over the months, a number of justices reviewed and amended the terminology of the injunctions to make them clearer and fairer. For example, in July 1993, Esson C.J.S.C. removed

language enjoining "creating a nuisance" -- legal language which some members of the public might not have understood -- and replaced it by more precise language specifying that what was prohibited was "physical" obstruction. Words could be used, signs could be paraded; what could not be done was to physically block the road.

(3) Summary on Jurisdiction

37 I conclude that the British Columbia Supreme Court had jurisdiction to make orders binding on persons who are not parties to the action.

B) Suing Unnamed Persons

38 The second issue is whether the use of terminology such as "John Doe", "Jane Doe" and "Persons Unknown" in the style of cause invalidates the order. The appellants argue that these terms represent an attempt to sue the general public, and that such terms are not justified under the British Columbia Rules of Practice and the principles developed under the Rules.

39 The practice of using terms like "John Doe" is directed at permitting a plaintiff to sue a person whose name the plaintiff does not know: *Jackson v. Bubela and Doe*, [1972] 5 W.W.R. 80 (B.C.C.A.). Under the British Columbia Rules, the procedure for objecting to such an appellation is to apply to have the terms struck out. Alternatively, an application by the plaintiff to have the defendant's name substituted for "John Doe" for the purpose of obtaining relief against him may be dismissed if the use of the "John Doe" designation is found to have been inappropriate. We have been referred to no authority suggesting that an order made under a valid action is invalid because the style of cause of the action included a reference to "John Doe, Jane Doe and Persons Unknown".

40 In fact, the use of "John Doe, Jane Doe and Persons Unknown" in the present action appears to be surplusage. As discussed above, a person who is not a party to an action is bound to respect an order made in the action, on pain of being found in contempt of court. This was the procedure used to enforce the order here at issue. None of the protesters was charged or sued as a party to the action. So the question whether relief may be obtained against them in the action on the basis of having sued them as "John Doe, Jane Doe and Persons Unknown" never arose. Accordingly, it is unnecessary for this Court to decide whether, as a matter of pleading, the use of these terms in the style of cause could validly engage members of the public served with the writ.

C) Provisions Authorizing Arrest and Detention

41 The appellant Valerie Langer has questioned the appropriateness of including a provision authorizing the police to arrest and detain persons breaching the injunction. She argues that no authorization or direction from the court is necessary to enable the police to act. The respondent accepts that the authorization is superfluous, and states that it is included only because the police have requested such wording. No objection to this term was made before Hall J. and it is not suggested that it vitiates the order. In these circumstances, this Court need not consider it further. I observe only that the inclusion of police authorization appears to follow the Canadian practice of ensuring that orders which may affect members of the public clearly spell out the consequences of non-compliance. Members of the public need not take the word of the police that the arrest and detention of violators is authorized because this is clearly set out in the order signed by the judge. Viewed thus, the inclusion does no harm and may make the order fairer.

V. Conclusion

42 I conclude that the British Columbia Supreme Court has jurisdiction to make orders enjoining unknown persons from violating court orders. Such orders are enforceable on the long-standing principle that persons who are not parties to the action, but who violate an order of the court, may be found guilty of contempt for interfering with justice. Provided that contempt is the only remedy sought, it is not necessary to join all unknown persons in the action under the designation, "John Doe, Jane Doe and Persons Unknown". Nor, strictly speaking, is it essential that the order refer to unknown persons at all. However, the long-standing Canadian practice of doing so is commendable because it brings to the attention of such persons the fact that the order may constrain their conduct. Similarly to be commended is the practice followed by the courts in this case of ensuring that the wording of the orders is clear and that their effect is properly circumscribed.

43 I would dismiss the appeal with costs.

Nova Scotia v. Freedom Nova Scotia

Nova Scotia Judgments

Nova Scotia Supreme Court

Halifax, Nova Scotia

S. Norton J.

Heard: May 14, 2021.

Judgment: May 14, 2021.

Docket: Hfx. No. 506040

[2021] N.S.J. No. 199 | 2021 NSSC 170

Between The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia, the Department of Health and Wellness, and the Chief Medical Officer of Health, Applicant, and Freedom Nova Scotia, John Doe(s), Jane Doe (s), Amy Brown, Tasha Everett, and Dena Churchill, Respondents

(39 paras.)

Counsel

Halifax, Nova Scotia.

DECISION ON *EX PARTE* INJUNCTION

S. NORTON J.

Introduction

1 An anti-mask rally organized by the Respondents, "Freedom Nova Scotia", is scheduled to occur at Citadel Hill, in Halifax, on Saturday May 15, 2021 at 1:00 p.m. A Worldwide Freedom Rally is also being scheduled for Barrington, Nova Scotia, on May 15, 2021 at 6:00 p.m. at the Barrington baseball field.

2 Historical gatherings organized by Freedom Nova Scotia and others have failed to comply with COVID-19 Emergency Health Orders made under section 32 of the Nova Scotia *Health Protection Act*, SNS, 2004, c. 4, s. 1. Consequently, the Attorney General of Nova Scotia (hereinafter, "Province") is seeking a *quia timet* injunction on evidence to prohibit the rally from taking place, among other relief. The injunction is said to be required to prevent or reduce the community spread of COVID-19 within the Province of Nova Scotia and to ensure compliance with current Health Orders made under the *Health Protection Act*.

3 The *quia timet* or pre-emptive injunction sought would: (1) order compliance with the provisions of the *Health Protection Act*; (2) enjoin the Respondents and any other person acting under their instructions or in concert with them, from organizing in-person public gatherings; and (3) authorize law enforcement to engage in enforcement measures to ensure compliance with the *Health Protection Act* and any order issued to date under that Act.

Procedure

4 By letter dated May 11, 2021, the Attorney General wrote to the Court requesting permission to file the Application on an expedited basis pursuant to *Civil Procedure Rules* 2.03 and 5.02. As designated Chambers Judge, I granted the request allowing the filing deadlines to be abridged and scheduled a virtual hearing for May 14, 2021 at 9:30 a.m.

5 On May 13, 2021 the Applicants filed the Notice of *Ex Parte* Application pursuant to *Civil Procedure Rule* 5.02. Accompanying the Notice, and forming the evidentiary basis for the Application, were Affidavits of Dr. Robert Strang, Nova Scotia's Chief Medical Officer of Health, sworn May 12, 2021; and, Hayley Crichton, Director of Public Safety and Investigations, Department of Justice for the Province of Nova Scotia, sworn May 12, 2021. On May 14, 2021 the Applicants filed "Restated Order #2 of the Chief Medical Officer of Health Under Section 32 of the *Health Protection Act* 2004, c.4, s.1", dated May 13, 2021. The Applicants also filed a Pre- Hearing Memorandum. I reviewed all of these materials in advance of the hearing.

6 Today, May 14, 2021 I heard oral submissions from the Applicants virtually.

Facts

7 Based on the qualifications cited in his affidavit, I qualify Dr. Robert Strang as an expert witness capable of giving expert opinion evidence in the field of Public Health and Preventative Medicine, the assessment and interpretation of evidence in public health matters and in particular those related to SARS-CoV-2 and COVID-19. His affidavit will be accepted as his written report.

8 Based on the affidavit evidence of Hayley Crichton, I make the following findings of fact:

1. Worldwide Rally for Freedom and Democracy is a global movement and organizer that has been developed with the explicit objective of spreading anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric.
2. In the Nova Scotia context, mask requirements and adherence to restrictions are set out in the Public Health Orders.
3. The Restated Public Health Order issued under section 32 of the *Health Protection Act*, SNS, 2004, c. 4, s. 1, by Dr. Robert Strang, was last updated on May 8, 2021 ("Public Health Order"). A true copy of the Public Health Order is marked Exhibit "A" of Hayley Crichton's affidavit.

4. On April 23, 2021, Halifax Regional Police attended a large gathering at a private residence. 22 fines were issued as a result of this gathering as it was in contravention of the Public Health Order.
5. On April 25, 2021, RCMP attended a residence in Wolfville, Nova Scotia, at which 30 people were gathered in contravention of the Public Health Order for a party. 4 fines were issued as a result of this gathering.
6. On May 3, 2021, New Glasgow Police attended a private residence in Trenton, Nova Scotia. Eight people were gathered in contravention of the Public Health Order and were subsequently ticketed.
7. Worldwide Rally for Freedom and Democracy has planned a global event entitled, "The Worldwide Demonstration May 15, 2021". The associated open Facebook event page has a total of 31,000 followers.
8. In Nova Scotia, participation in the Worldwide Rally for Freedom and Democracy global events are organized by the local Facebook group "Freedom Nova Scotia". The Freedom Nova Scotia Facebook open group has a total of 896 followers and the related Instagram account has 100 followers.
9. On March 20, 2021, Freedom Nova Scotia organized an open event on Facebook to rally against mask wearing and restrictions. Attendees gathered in a large group of approximately 100 people, the attendees were not wearing masks and were not maintaining six feet of physical distance, in direct contravention of the Public Health Order. The event drew media attention.
10. A picture of the event derived from CTV News is marked Exhibit "B" of Hayley Crichton's affidavit. The picture shows a large gathering of people who can be observed to not be wearing masks, nor maintaining a distance of six feet from one another.
11. Freedom Nova Scotia has also organized rallies in the greater Halifax area on March 28, 2021 (Spring Garden Road), April 1, 2021 (Alderney Landing) and May 1, 2021 (Halifax). The rallies were in contravention of the Public Health Order.

Anti-Mask Rally

12. Freedom Nova Scotia has scheduled an event for Saturday May 15, 2021, at 1:00pm entitled, "Worldwide Rally for Freedom - Halifax" in support of anti-mask rhetoric. The event is open and there are 261 comments on the event page, with 88 people listed as "interested" and 66 people listed as "going" as of May 12, 2021.
13. Historical public gatherings organized by Freedom Nova Scotia have not complied with the requirements of COVID-19 Emergency Health Orders issued under section 32 of the *Health Protection Act*, including but not limited to:
 - a. masking requirements;
 - b. attendance limits applicable to indoor or outdoor gatherings; and
 - c. minimum physical distancing requirements.
14. During the week of May 3rd, 2021, Halifax Regional Police Inspector David Boon was contacted by Freedom Nova Scotia event participant Amy Brown via telephone. Ms.

Brown requested protection for the rally participants who will attend Citadel Hill to protest the COVID-19 lockdown and restrictions.

15. Halifax Regional Police advised Ms. Brown that any such gathering would contravene the Public Health Order, and potentially the Travel Directive issued under the *Emergency Management Act*, SNS, 1990, c. 8, s. 1; 2005, c. 48, s. 1. (should people travel in from outside HRM).
16. The Halifax Regional Police provided the Province with information pertaining to Freedom Nova Scotia, Worldwide Rally for Freedom and Democracy, inclusive of the related social media posts advertising the event scheduled for Saturday May 15, 2021, at 1:00 pm entitled, "Worldwide Rally for Freedom - Halifax".
17. The information provided by the Halifax Regional Police to the Province references multiple rallies hosted by Freedom Nova Scotia. The information provided by the Halifax Regional Police contains photographs depicting attendees gathering without masks and in large groups in direct contravention of the Public Health Order. This is supplemented by screenshots of the open group in which commenters have requested Halifax Regional Police and Government intervention.
18. A Worldwide Freedom Rally is also being scheduled for Barrington, Nova Scotia, on May 15, 2021 at 6:00 pm at the Barrington baseball field. A Worldwide Freedom Rally is also scheduled for Dartmouth, Nova Scotia (Alderney Landing) on May 15, 2021 at 1:00 pm.
19. Similar anti-mask, anti-vaccine, anti-restriction protests have taken place across Nova Scotia that have included gatherings of people who were not wearing masks and were not maintaining six feet of physical distance, in direct contravention of the Public Health Order.
20. On April 24, 2021, an event was planned at the New Brunswick and Nova Scotia border to protest COVID-19 restrictions, including border closures and mask requirements, by disrupting traffic on Hwy 104. The event organizer Tasha Everett posted the following to her open Facebook page, "12PM tomorrow! Be there! Its time to make more noise than ever before! Truckers have our backs and are planning to block the highways with us. United we stand, Divided we fall. A screenshot of this post is marked Exhibit "G" of Hayley Crichton's affidavit.
21. On May 9, 2021, Kings District RCMP were called to Weston Christian Fellowship Church in Weston, Nova Scotia. 26 people were gathered at the church in contravention of the Public Health Order. 26 fines were laid against individuals and a larger fine was laid against the organizer.
22. On May 12, 2021, the Province received the following information from the Royal Canadian Mounted Police (RCMP) regarding a rally held on May 9, 2021:

PURPOSE:

To update the Attorney General of a protest, in relation to the continued border restrictions between Nova Scotia and New Brunswick that occurred on May 9, 2021.

BACKGROUND:

A group on Facebook, identified as "Support to OPEN The NS/NB Border", organized a protest for May 9, 2021 at 12:00 pm, at the NS Tourism Centre along Hwy 104, immediately as you enter Nova Scotia.

Organizers indicated that this was strictly about the border closure and the impact it is having on everyday lives.

CURRENT STATUS:

An assembly took place as scheduled on May 9, at 12:00 pm.

Approximately 20 protesters assembled along the Nova Scotia side of the Provincial border, Highway 104 Eastbound lane.

At approximately 12:30 pm, a passenger from a vehicle involved in the protest was seen throwing traffic cones into the ditch which had been positioned to block off exit 1.

The interaction between the RCMP and the vehicle passenger was met with hostility from the occupants of the vehicle.

Shortly after, a hostile crowd of 15-20 people formed around the police officer.

Protesters were recording police and expressed negative comments.

Protesters were not wearing masks or social distancing.

All attendees left by 2:30 pm.

Commentary from attendees suggests protests will be a weekly occurrence.

23. On May 10, 2021, Dena Churchill posted an advertisement for the May 15, 2021 rally on her Facebook page, among other anti-mask, anti-vaccine, anti-restrictions, and anti-lockdown rhetoric.

9 Based on the evidence of Dr. Strang, I make the following findings of fact:

COVID-19

1. COVID-19 is a new disease which can cause adverse health outcomes, including death in individuals with pre-existing medical conditions and in individuals over 65 years of age. People not in a high-risk group can also experience adverse health outcomes after contacting the SARS-CoV-2 virus which causes COVID-19.
2. In addition, SARS-CoV-2 is a new strain of coronavirus for which there is no underlying immunity and therefore wide spread of the virus can create a significant burden of disease and negative impacts on health systems, communities and economies.
3. There are at present no drug therapies to cure COVID-19 nor its various strains. Accordingly, the only available resources to prevent or reduce the spread of the virus, aside from vaccination, involve the use of public health requirements, including physical distancing measures, limiting the size of gatherings and mandatory mask wearing in public places, whether indoors or outdoors, particularly where physical distancing cannot be maintained.

4. Nova Scotia public health requires that people maintain a distance of two meters from one another. This physical distance requirement is based on current knowledge regarding the virus' spreading mechanisms.
5. If left unchecked, SARS-Cov-2 can spread exponentially, for this reason, it is critical that public health requirements are followed in order to minimize the spread of the virus, reduce long-term consequences, and reduce the number of hospitalizations and deaths. It is therefore imperative to reduce the number of contacts an individual has with others to reduce the risk of spread of the virus.
6. Due to the virus' transmissibility patterns, restrictions on how people interact with others outside of their households are necessary to prevent the transmission of SARS-CoV-2 and its variants, which in turn can effectively reduce cases of COVID-19. This includes mandating the use of mask wearing in public places, whether indoors or outdoors, particularly where physical distancing cannot be maintained.
7. The current Public Health Order outlines measures directed toward preventing or reducing the transmission of COVID-19 among the population of Nova Scotia.
8. Transmission of SARS-Co V-2 can occur even when infected people are asymptomatic. SARS-CoV-2 is spread primarily from close person to person contact. The virus may be transmitted by respiratory droplets or droplet nuclei (aerosols) produced when an infected person breathes, coughs, sneezes, talks, or sings. The virus may also be transmitted by touching a surface or object contaminated with the virus and then touching the eyes, nose, or mouth.
9. Risk of SARS-Co V-2 transmission depends on many variables, such as location (indoors versus outdoors), quality of ventilation, and activity. The Public Health Order requires that people maintain a distance of two meters (six feet) from one another. This physical distance requirement is based on current knowledge of droplet spread which is the main way the virus spreads between people.
10. These requirements are designed to be implemented together as no one measure alone will prevent all SARS-CoV-2 person-to-person transmission.
11. The time from infection with SARS-CoV-2 until the development of observable symptoms is called the incubation period. The incubation period can last 14 days or very rarely longer. Unfortunately, infected people can transmit SARS-CoV-2 to others beginning about 48 hours before symptoms are present (pre-symptomatic transmission) until at least 10 days after, longer if symptoms continue past 10 days.
12. Not all people infected with SARS-CoV-2 develop symptoms but, even without symptoms, an infected person can transmit the virus to others. This is called asymptomatic transmission.
13. SARS-CoV-2 can be spread through direct or indirect (surfaces) contact with an infected person. Community spread refers to the spreading of a disease from person to person in the community. Community spread can occur when the source is known or unknown. The latter form of spread poses a serious threat to the community. The effectiveness of contact tracing is greatly reduced in cases of unknown community spread.

14. COVID-19 testing is available in Nova Scotia for both asymptomatic and symptomatic people, people in outbreak settings, and people identified as a close contact of a case. A COVID-19 test result only reflects a snapshot of a moment in time. A negative result does not necessarily mean that the person is not infected. A person infected with SARS-CoV-2 could have 13 days of negative results and a positive test on day 14.

Nova Scotia's Current COVID-19 Situation

The Spread of COVID-19

15. Since March 1, 2020, there have been a total of 4152 confirmed cases of COVID-19 and 71 deaths reported.
16. During Wave 3 (April 1, 2021 - present), there have been 2410 confirmed cases and 5 deaths have been reported. The cases reported in Wave 3 constitute 58% of the total cases reported in Nova Scotia since March 1, 2020. In addition, there have been 103 hospitalizations (non-ICU and ICU) compared to 12 during Wave 2, 54% of hospitalizations occurred in individuals <60 years of age and 13.7% of contacts became cases, compared to 7.6% in Wave 2 suggesting that the virus is more transmissible.
17. SARS-CoV-2 can spread exponentially if left unchecked. It is critical that Nova Scotians follow public health requirements and protocols to minimize the spread of the virus and its variants, reduce the long-term consequences, and reduce the number of hospitalizations and deaths.
18. Left unchecked SARS-CoV-2 virus will spread within a population resulting in an exponential growth in the number of people infected. Public health measures put in place in December 2020 brought cases down. When public health measures were eased in March 2021, cases plateaued but began to rise again in late April. Even with increased public health requirements in place, the number of recognized SARS-CoV-2 infections (COVID-19 cases) has continued to grow dramatically in the past 3 weeks.

Nova Scotia's COVID Health Care Capacity related to COVID-19

19. When this capacity is exceeded, non-COVID-19 patients will experience cancelled treatments for non-urgent conditions. The cancellation of these non-urgent, but necessary, surgeries can have health impacts, such as ongoing pain and mobility issues.
20. If Nova Scotia's COVID-19 hospitalization capacity is significantly exceeded, it could result in the need to ration acute care resources. This may mean that some patients, who are in need of critical care supports, may be unable to receive those supports.
21. In Nova Scotia, as of May 11, 2021, there were 1591 active cases of people with COVID-19, 64 people in the hospital due to COVID-19. There were 10 patients in the ICU, 54 patients in non-ICU beds due to COVID-19 and 71 people have died from COVID-19 or associated complications since the first Public Health Order was issued on March 23, 2020. This high level of hospitalization will result in continued cancellation of non-urgent surgical treatments. If the requirements for in hospital care continue to escalate, a need to triage access to care supports, especially supports in intensive care, may be required. This could require doctors and nurses to make decisions between which patients live and which die.

Nova Scotia's COVID-19 Public Health Measures

22. Nova Scotia has attempted to control the spread of the SARS-CoV-2 virus by implementing a number of public health requirements under the Public Health Order. Restrictions on how people interact with others outside of their households in public places, whether indoors or outdoors, are necessary to prevent the transmission of SARS-CoV-2 and are effective in reducing cases of COVID-19.
23. Nova Scotia's approach has been to attempt to protect Nova Scotians and control the spread of the virus through the enactment of Public Health restrictions on gathering limits, physical distancing and mandatory masking, no greater than reasonably required, considering the circumstances of the global pandemic and risk mitigation strategies required to respond to this communicable disease and its negative impact on Nova Scotians' lives. As the number of COVID-19 cases and related hospitalizations, ICU stays, and deaths have increased, public health measures have also evolved.
24. One of the health measures that Nova Scotia has employed to control the spread is to implement mandatory masking. Masks, when worn properly, are a valuable tool in reducing the transmission of SARS-CoV-2. The use of masking can prevent an infected person from transmitting the virus to others and use of masks, especially medical masks, can help protect a healthy individual from infection in public places, whether indoor or outdoor settings. Masking, on its own, is not sufficient to control the spread of COVID-19.
25. In response to the number of COVID-19 cases with no identifiable source, Nova Scotia implemented additional public health measures, aimed at limiting the spread in high-risk settings or in settings with high-risk activities. High risk activities are activities that have more expulsions of air than ordinary activities. With increased expulsions of air, there is an increased risk of respiratory droplets or aerosols. For example, singing, shouting, and activities that result in heavy breathing are higher risk activities. These activities also may occur in higher risk settings, such as in indoor settings or settings where individuals will remain for prolonged periods of time. Reducing time spent indoors with large groups of people and reducing the time spent indoors engaging in high-risk activities can reduce the risk of the spread of COVID-19. Recent evidence also shows that even outdoors, if people are not distanced from each other or masked, transmission can happen from an infectious person to someone else.
26. The available evidence shows that widespread public masking, in addition to other public health measures, such as reducing time spent indoors with large groups of people (relative to the size of the room and the spacing of people within the room) while engaging in high-risk activities, can contribute to controlling the overall transmission of SARS-CoV-2. In addition, outdoor gatherings must also include measures such as restricted gatherings, and physical distancing and masking in order to prevent COVID-19 transmission.
27. In Dr. Robert Strang's medical opinion if the scheduled social gathering is held on or about May 15, 2021 at Citadel Hill, in Halifax, Nova Scotia then there is a substantial risk of Covid-19 transmission among the attendees.
28. It is also Dr. Strang's medical opinion that social gatherings similar to the one intended to be held by Freedom Nova Scotia on May 15, 2021 should not occur anywhere in the

Province of Nova Scotia because there is a substantial risk of Covid-19 transmission among the attendees.

10 By "RESTATED ORDER #2 OF THE CHIEF MEDICAL OFFICER OF HEALTH UNDER SECTION 32 of the HEALTH PROTECTION ACT 2004, c. 4, s. 1." dated May 13 2021, an "illegal public gathering" was defined and prohibited as follows:

13.5 For the purpose of section 13.6, an "illegal public gathering" is defined as a gathering that does not comply with the requirements of this Order, including:

- (a) the attendance limits applicable to gatherings, whether indoors or outdoors;
- (b) physical distancing requirements; and
- (c) masking requirements.

13.6 For greater certainty, persons are prohibited from:

- (a) organizing an in-person gathering, including requesting, inciting, or inviting others to attend an illegal public gathering;¹⁰
- (b) promoting an illegal public gathering via social media or otherwise; or
- (c) attending an illegal public gathering of any nature, whether indoors or outdoors.

Law

11 Section 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240 provides this Court with the authority to order an interlocutory injunction "in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made".

12 The three-part test for an interlocutory injunction is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) is for the applicant to show:

1. a serious question to be tried between the parties;
2. the applicant will suffer irreparable harm if the injunction is not granted; and
3. that the balance of inconvenience lies in favour of the applicant.

13 The test for an interlocutory injunction has been applied many times by the Supreme Court of Nova Scotia.

14 However, the injunction being sought in the present case is a *quia timet* injunction. *Quia timet* means, "because he fears or apprehends". While injunctions are generally aimed at preventing harm into the future based on the recent conduct of a defendant, in a *quia timet* injunction the injunctive remedies are sought before any harm has actually been suffered and where the harm is only apprehended and expected to occur at a point in time in the future.

15 In *526901 BC Ltd. V. Dairy Queen Canada*, 2018 BCSC 1092, Justice Kent summarized the law pertaining to *quia timet* injunctions as follows:

71 For sure, the law permits a *quia timet* injunction to be granted when wrongful acts have not yet occurred but are imminent or have been threatened. To obtain such an injunction, an applicant

must establish not only the three elements of the *RJR McDonald* test but also that there is a high degree of probability the alleged harm will in fact occur: *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at para. 35; and *XY Inc. v. IND Lifetech Inc.*, 2008 BCSC 1215 (B.C. S.C. [In Chambers]) at para. 70.

16 In *Robinson v. Canada (Attorney General)*, 2019 FC 876, Justice Gascon expanded on the analysis of the law pertaining to *quia timet* injunctions at paras. 87 to 91:

87 All injunctions are future-looking in the sense that they all intend to prevent or avoid harm rather than compensate for injury already suffered (Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) (loose-leaf updated 2018, release 23) [Sharpe] at para 1.660). One type of injunction that is frequently considered and issued by the courts is the *quia timet* ("because he or she fears") injunction, where injunctive remedies are sought before any harm has actually been suffered and where the harm is only apprehended and expected to occur at some future point. To a certain extent, and given its timing, the mandatory interlocutory injunction sought by Mr. Robinson is akin to such a *quia timet* injunction.

88 Applications for this type of injunction are not necessarily dismissed by the courts even though they often require the motion judge to assess the propriety of injunctive relief without the advantage of actual evidence regarding the nature and extent of the alleged harm. To assess prospective harm for quia timet injunctions, the courts have adopted a cautious approach generally requiring two elements: a high probability that the alleged harm will occur; and the presence of harm that is about to occur imminently or in the near future, thus adding a temporal dimension to the feared harm (*Merck & Co. v. Apotex Inc.*, [2000] F.C.J. No. 1033, 2000 CarswellNat 1291 (Fed. C.A.) at para 8; *Doucette v. Canada (Attorney General)*, 2018 FC 697 (F.C.) at para 23; *Gilead Sciences, Inc. v. Teva Canada Ltd.*, 2016 FC 336 (F.C.) [Gilead] at paras 5, 10; *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 162 (F.C.) [Amnesty] at para 70; see also Sharpe at para 1.690).

89 In the context of interlocutory injunctions, the first element (i.e., the high probability that the harm will occur) has often been expressed by the Court in terms of clear and non-speculative evidence that irreparable harm will ensue if the interlocutory relief is not granted (*Amnesty* at paras 69, 123), thus mirroring the general test for irreparable harm. On the imminence of harm, the case law developed by this Court offers no clear definition or timeline of what is "imminent", but rather suggests that it will depend on the facts of each case. For example, harm distant from as much as 18 months has been found to be imminent (*Gilead* at paras 5-6). In fact, in *Gilead*, the Court reframed the imminence criterion as a factor to be considered in determining the likelihood of future harm (*Gilead* at para 11):

[11] At the same time the requirement of imminence in the temporal sense may be relevant in the determination of the likelihood of a future event. A potential event that is more distant in time may be an event that is less likely to occur.

Furthermore, temporal imminence appears to be a subordinate consideration in a case where the likelihood of future harm appears high: see *Canadian Civil Liberties Assn v Toronto Police Service*, above, at para 88.

90 In other words, the determinative element is the likelihood of harm, not its futurity (*Horii v. R.*, [1992] 1 F.C. 142 (Fed.C.A.) at para 13). The fact that the harm sought to be avoided is in the future does not necessarily make it speculative. On this requirement to prove the imminence of

harm, Justice Sharpe (writing extrajudicially) suggests that the temporal imminence of harm may not be the best way to analyze the issue, and that the courts should rather look at whether the factors relevant in the granting of injunctive reliefs have "crystallized" (Sharpe at para 1.750). According to this approach to the imminence criterion, prematurity only arises in situations where, for example, the nature or the extent of the harm may change between the time of the decision and the moment where the harm would occur. In other words, a *quia timet* injunction should not be granted by the courts unless the situation that will exist when the alleged harm eventually occurs is already crystallized.

91 In light of the foregoing, I am of the view that the test applicable for apprehended harm is whether there is clear, convincing and non-speculative evidence allowing the Court to find or infer that irreparable harm will result if the relief is not granted, using the cautious approach prescribed for quia timet injunctions. Stated differently, to meet its burden in an application where the harm is apprehended and more distant, the moving party must establish, on a balance of probabilities, that there is clear, convincing and non-speculative evidence demonstrating that such harm has crystallized, so that any findings or inferences made about the harm can be found to reasonably and logically flow from the evidence.

[Emphasis added]

17 In the present case, the Court must assess the propriety of the injunctive relief without the advantage of actual evidence regarding the nature and extent of the alleged harm. The courts have adopted a cautious approach generally requiring two elements: the presence of harm that is about to occur imminently or in the near future; and, a high probability that the alleged harm will occur.

a. the presence of harm that is about to occur imminently

18 In Nova Scotia, the presence and spread of COVID-19 and its' variants among the public is irrefutable.

19 The harm is the continued spread of COVID-19 within the Province if the anti-mask rally or other rallies and public gatherings in violation of the Health Orders are permitted to proceed as scheduled on May 15, 2021, or otherwise.

b. high probability that the alleged harm will occur

20 The Court finds that there is a high probability that the harm will occur because the correlation between social gatherings and the spread of COVID-19 can reasonably be inferred from the evidence of Dr. Robert Strang.

21 Based on the foregoing, the Court finds that there is clear, convincing and non-speculative evidence allowing the Court to infer that irreparable harm will result if the injunction is not granted. The Province has met the test for a *quia timet* injunction on the evidence.

Quia Timet Injunctions and Charter Considerations

22 In *Ingram v. Alberta (Chief Medical Officer of Health)*, 2020 ABQB 806, the applicants challenged the validity of public health orders aimed at managing the spread of COVID-19, made by Alberta's Chief

Medical Officer of Health (CMOH), on grounds that they offended the *Alberta Bill of Rights (ABR)* and unjustifiably infringed rights protected by the *Canadian Charter of Rights and Freedoms*. The applicants also challenged the validity of certain sections of Alberta's *Public Health Act* on grounds they violated the *ABR, Constitution Act, 1867, and the Charter*.

23 In *Ingram*, the applicants argued that restrictions and mandatory mask requirements unjustifiably infringed rights protected by ss. 2 and 7 of the *Charter*.

24 On the application Ms. Ingram asserted that without the injunction staying the Business Closure Requirement, there would be no possibility for her to recover losses of revenue from the closure of her gym and in turn, the value of her shares in that business.

25 In *Ingram*, the court found that her evidence fell short of the clear evidence required to establish irreparable harm of that nature. The court went on to find that it was speculation that an interlocutory injunction will necessarily ameliorate business losses, unemployment, or financial stress (para 57). It was not enough at irreparable harm stage for the applicants to simply say that *Charter* rights were being infringed; and to ask the court to presume that if the injunction was not granted, they would suffer harm for which there was no just and reasonable remedy.

Balance of Convenience and Public Authorities

26 With respect to balance of convenience and public interest considerations I adopt the following analysis from the court in *Ingram*:

64 While it is "... open to all parties in an interlocutory *Charter* proceeding to rely upon considerations of public interest" and to "... tip the scales of convenience in [their] favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought", the Supreme Court of Canada in *RJR* also observed at paragraph 73 that:

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

65 And at paragraphs 76-78 of *RJR* the Court stated that:

... In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the

government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

...

81 I am bound by Supreme Court of Canada authority to assume that the Restrictions serve the public good; here, that they protect public health. I also have evidence from Dr. Hinshaw explaining how, left unchecked, the virus is anticipated to spread, threatening people's lives and the capacity of the health care system to provide patient care for Albertans who need it, whether as a result of COVID-19 or otherwise.

82 The Applicants ask me to find that there will be no harm because the Respondents have not provided an adequate scientific basis to establish that the Restrictions work.

83 Not only is this inconsistent with their acknowledgment that it is in the public interest to address the transmission of COVID-19, it is not the law that guides the Court on an interlocutory application for injunctive relief.

84 Again, and precisely because these applications are brought on short notice and before the Court has a complete evidentiary record and can undertake the complex *Charter* analysis required, I must assume the Restrictions protect public health. Moreover, Dr. Hinshaw's affidavit sets out the data that leads to her concern for the health and safety of all Albertans if the Restrictions are stayed.

85 Given the risks associated with the spread of the virus that the Respondents are seeking to manage, I am of the view that there is a greater public interest in maintaining the integrity of Order 42 than there is in staying the parts of it that the Applicants ask me to suspend so that they, and other citizens of this Province, are able to gather and celebrate the holidays and to otherwise exercise their religious freedoms.

[Emphasis added]

27 In order to grant a *quia timet* injunction, the Court must find the following:

1. The harm that is anticipated is imminent.
2. The harm is irreparable.
3. Damages would not be an adequate remedy.

28 Having regard to the affidavit of Dr. Robert Strang, the Court finds that the harm that is anticipated if the anti-mask rally is permitted, i.e. the continued spread of COVID-19, is imminent.

29 In the present case, damages are not an adequate remedy because the harm associated with contracting COVID-19 is death. There are also serious medical and health complications that occur in individuals who contract the virus. The associated impact on the public health care system, communities, and economies is immeasurable.

30 In the context of interlocutory injunctions, the balance of convenience analysis requires the court to

consider which of the parties would suffer greater harm if the injunction was not granted: *Laurent v. Fort McKay First Nation*, 2008 ABQB 84 (Alta. Q.B.), at para 10.

31 The Court finds that the balance of convenience does not favour permitting the anti-mask rally to proceed on May 15, 2021. The balance of convenience also does not favour permitting similar events to be held within the Province at any point in the future while the Public Health Order preventing such activity is in place.

32 There is a greater public interest in maintaining integrity of the current Public Health Order and the restrictions set out within that Order than permitting the rally to be carried out as planned.

Conclusion

33 The intensive care units at our hospitals are filling with COVID patients. The health care workers in this Province have been working tirelessly for more than 14 months to manage this crisis. Schools have had to close. Businesses have had to close. Many Nova Scotians are unemployed as a result. Yet, Nova Scotia has done better than many other provinces because its public health officials have taken an aggressive approach based on science, medicine and common sense. The vast majority of Nova Scotians have and continue to support and follow the public health recommendations with a view to returning to pre-COVID activity and enjoyment of life as quickly and as safely as possible.

34 The Respondents and those who would support them by attending the planned or other in-person public gatherings, without following the public health recommendations and orders, are uninformed or willfully blind to the scientific and medical evidence that support those measures. Their plan to gather in-person in large numbers, without social distancing and without masks, in contravention of the public health recommendations and orders shows a callous and shameful disregard for the health and safety of their fellow citizens.

35 The Applicants are entitled to the injunction sought to:

1. prevent further transmission of COVID-19;
2. ensure the continued functioning of the health-care system; and
3. limit the amount of future deaths due to the virus.

36 It is appropriate that the order includes clear language that law enforcement officers and other law enforcement agencies will enforce the prohibitions. It is appropriate to include notice that law enforcement officers will arrest and charge anyone in breach of the prohibitions. The leading authority on injunctions against unknown persons is *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048. At paras 41-42, Justice McLachlin (as she then was) stated:

41 ... I observe only that the inclusion of police authorization appears to follow the Canadian practice of ensuring that orders which may affect members of the public clearly spell out the consequences of non-compliance. Members of the public need not take the word of the police that the arrest and detention of violators is authorized because this is clearly set out in the order signed by the judge. Viewed thus, the inclusion does no harm and may make the order fairer.

42 I conclude that the British Columbia Supreme Court has jurisdiction to make orders enjoining unknown persons from violating court orders. Such orders are enforceable on the long-standing principle that persons who are not parties to the action, but who violate an order of the court, may be found guilty of contempt for interfering with justice. Provided that contempt is the only remedy sought, it is not necessary to join all unknown persons in the action under the designation, "John Doe, Jane Doe or Persons Unknown". Nor, strictly speaking, is it essential that the order refer to unknown persons at all. However, the long-standing Canadian practice of doing so is commendable because it brings to the attention of such persons the fact that the order may constrain their conduct. Similarly to be commended is the practice followed by the courts in this case of ensuring that the wording of the orders is clear and that their effect is properly circumscribed.

37 The Province advises that it is its intention to serve the Respondents personally if possible and to post the Court's Order on the Government's COVID-19 internet website. That will form part of the Order. In addition, the Order will provide that the Order is to be posted if possible on all social media platforms associated with the Respondents and those of "Worldwide Rally for Freedom and Democracy".

38 The Order herein was granted on an *ex parte* basis. It is important that the Respondents, or anyone else effected by this Order, have an opportunity to apply to the Court to vary or challenge the Order or so much of it as effects that person. Accordingly the Order will contain a provision giving notice that any such person may apply to the Court, in accordance with the procedures set out in the *Civil Procedure Rules*, to challenge or vary the Court's Order.

39 The Applicants did not seek costs and none are ordered.

S. NORTON J.

Ottawa MacDonald Cartier International Airport Authority v. Madi

Ontario Judgments

Ontario Superior Court of Justice

R. Beaudoin J.

Heard: October 13, 2015.

Judgment: October 14, 2015.

Court File No.: 15-65373

[2015] O.J. No. 5362 | 2015 ONSC 6336

Between Ottawa MacDonald Cartier International Airport Authority, Plaintiff (Responding Party), and
Abed Madi, Hassan Karam, Faran Talla, Amrikh Singh, Roy Nioja and Harry Ghadban on their own
behalf and on behalf of the Membership of Unifor Local 1688, Defendants (Moving Parties)

(21 paras.)

Case Summary

Labour law — Industrial disputes — Injunctions — Picketing — Motion by defendant protestors to clarify injunction against them allowed — Injunction restrained defendants from restricting access to plaintiff's airport and restricted use of any electronic amplification devices used to generate noise — Defendants had since engaged in loud drumming activities — Noise level created by defendants was creating nuisance that interfered with plaintiff's operations and threatened health and safety of its staff — Defendants were to relocate to grassy area immediately in front of parkade — Defendants were not permitted to use drums or improvised percussive devices.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 2

Counsel

Porter Heffernan/Amy Arcand, for the Plaintiff/Responding Party).

Sean McGee/Alison McEwen, for the Defendants/Moving Parties.

ENDORSEMENT

R. BEAUDOIN J.

1 The Defendants (also referred to as "Unifor") bring this motion seeking to clarify or vary my Order dated August 14, 2015. On that date, I granted an injunction against the Defendants and at paragraph 10, I restrained the Defendants from restricting access to the Airport premises at any time.

2 Paragraph 13 provided:

There shall be no electronic amplification devices used to generate noise, including but not limited to, car horns, air horns, megaphones, sirens, or other devices of a similar nature.

3 There was a further injunction hearing on September 23, 2015 relating to events taking place on the Airport Parkway. It was apparent by that time that the Defendants had moved their blockade from the Airport premises to the City of Ottawa access roads leading to the Airport. The issue was the meaning of my Order that restrained the Defendants from restricting access to the Airport premises at any time. Prior to the hearing, Unifor and the City of Ottawa were able to reach an agreed resolution of the matters at issue. As a result, a motion by the Plaintiff (the Ottawa McDonald Cartier International Airport Authority ("OMCIAA")) seeking similar relief was adjourned.

4 At the original injunction hearing on September 23, and again on the return of this motion, OMCIAA has emphasized the peculiar security and safety responsibilities that are present at all times during its operations. Paragraph 13 of my Order was an attempt to balance between the Defendants' rights as picketers and the property rights of the Plaintiff. At that time, there was evidence that the noise levels were interfering with OMCIAA's ability to communicate and impeding its emergency response capacity. This led to the restriction against amplified sound.

5 Now there is clear evidence that members of the Defendant union have engaged in loud drumming activities that have, at times, interfered with many forms of communication used by OMCIAA's security teams such as radios, cell phones and verbal communications. There is also evidence that the noise levels generated by the drumming present occupational health and safety concerns for OMCIAA's employees and contractors.

6 As a result, OMCIAA has issued trespass notices to a number of individuals. The issuance of those notices triggered this motion.

7 In support of their motion, Unifor provided the affidavit of Harry Ghadban, its Eastern Ontario Director. He was cross-examined on that affidavit and he admitted that the statements he made at paragraph 26 were not truthful. He did not take the noise level readings as he had claimed. This admission seriously undermines the credibility of his other statements.

8 It is clear from his evidence that Unifor felt the need to make noise to draw attention to their situation since its members have been restricted in their place of protest to the southern portion of the median that separates the passenger terminal building and the Airport parkade.

9 It is also clear from the evidence that the union has not taken advantage of other forms of communication that are permitted by the existing injunction. Unifor members have vandalized city property in order to create noise making instruments. To be clear, this activity is not condoned by Unifor, but these incidents demonstrate Unifor's inability to effectively monitor the situation.

10 I heard evidence with respect to the applicable City of Ottawa bylaws as they relate to allowable noise levels. I am satisfied that it would be very difficult to enforce the provisions of those bylaws since the allowable decibel noise levels are far below the noise levels recorded at the Airport even during normal operations.

11 I also had the benefit of the evidence of the allowable noise levels pursuant to the applicable federal and provincial Occupational Health and Safety Guidelines.

12 While these are helpful, they do not address the particular security concerns that exist at the Airport. This is not just another office building. The evidence of James Armstrong, the Director of Security and Emergency Management at OMCIAA is that loud noises, demonstrations, and large gatherings of people within the vicinity of the Airport impair the Airport's ability to meet its statutory and operational obligations. They distract security resources including both video surveillance and in-person live resources. In an emergency of any kind, announcements must be made and heard. That loud noises are permitted in the vicinity of the Airport creates a risk that they will be drowned out. These concerns are further detailed in Mr. Armstrong's affidavit.

13 As set out by the Supreme Court of Canada in *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, protesting, including picketing, by labour groups and trade unions is a fundamental freedom protected by section 2 of the *Canadian Charter of Rights and Freedoms* and freedom of expression is particularly critical in the labour context. The Supreme Court held that (secondary) picketing is generally lawful unless tortious or criminal conduct is involved. This wrongful action model best balances the interests at stake and provides a rational test for limiting picketing.

14 In this case, there is clear evidence that the noise level created by the Defendants is creating a nuisance which interferes with the Airport's operations and threatens the health and safety of OMCIAA staff and its contractors. This is more than a simple annoyance as Unifor suggests. Some of the picketers have themselves taken to wearing headphones to protect themselves from the sound of their own drumming. I am satisfied that the Defendants have created noise at levels far beyond the normal ambient levels that exist even in the busy environment of the Airport.

15 The Defendants have offered to use non-metallic instruments in making any noise to call attention to their protest. They have offered a protocol with respect to setting the maximum noise levels and for the monitoring of the same. This proposal becomes problematic since any sudden increase in the noise levels could interfere with any immediate response to an emergency. The sad history of this labour dispute discloses that the Defendants have relied on any imprecise language in the August 14th Order to avoid any limitations imposed by the injunction to further their attempts to interfere with the OMCIAA's operations. Clear language is required.

16 In my view, the only practical and enforceable solution would be to relocate the protesters to the grassy area immediately in front of the parkade building. This would provide the picketers with increased visibility to all persons exiting the arrival area of the Airport and they can communicate their message without the need for any instruments of any kind. This avoids any need to monitor noise level; provides clarity for all concerned, and allows for relatively easy enforcement. Unifor's request to be relocated to the

center portion of the median presents too many risks given the history this dispute and this was rejected by me on August 14, 2015

17 Accordingly, the trespass notices issued to Harry Ghadban, Michelle Arruda, Douglas Aitchison, Joshua Coles and Ron Gerard are to be withdrawn.

18 My Order dated August 14, 2015 is varied as follows:

19 Paragraph 4 should be replaced with the following language: Picketers shall be permitted on the grassy area of on the east side of the parkade building between the two entrances to the parkade more particularly identified by XXX on the attached sketch (Appendix A) of the Airport premises.

20 Paragraph 13 shall now read: Unifor and its members, officers, and supporters will not make noise on the Airport premises using drums or improvised percussive devices or any other instruments or any noise amplification devices.

21 The parties may provide their written submissions on costs as follows: The moving party within 10 days; the responding party, ten days thereafter.

R. BEAUDOIN J.

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	WEDNESDAY, THE 16 th DAY
REGIONAL SENIOR JUSTICE HACKLAND	)	OF JANUARY, 2013
	)	

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Plaintiff

- and -

JOHN DOE, JANE DOE and PERSONS UNKNOWN

Defendants

ORDER

THIS MOTION made without notice by the Plaintiff for an Order varying and continuing the Order granted by this Court on January 5, 2013 against the Defendants, was heard this day by teleconference at the Ottawa Court House, 161 Elgin Street, Ottawa, Ontario.

ON HEARING the submissions of counsel for the Plaintiff, on reading the materials filed, and on noting the Plaintiff's undertaking to abide by any order this Court may make concerning damages, no one having appeared on behalf of the Defendants,

1. **THIS COURT ORDERS** that the Defendants and each of them, and any and all persons having knowledge of this Order, be and hereby are restrained and enjoined from directly or indirectly, by any means whatsoever:

- (a) trespassing on the Plaintiff's railway right-of-way at Milepost 209.03 at the Wymans Road crossing in the Kingston Subdivision of the Plaintiff's main railway line between Toronto and Montreal (the "Main Line"), Milepost 214 at the Shannonville Road crossing on the Main Line, or anywhere between Milepost 200 to 220 in the Kingston Subdivision of the Main Line, or anywhere else on the Main Line;
- (b) physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to impede, restrict or in any way physically interfere with, the Plaintiff's carrying on of its business and in particular its right to operate trains on the Main Line;
- (c) physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to prevent, impede, restrict or in any way physically interfere with the removal of any objects from the Main Line or the maintenance, reconstruction or alteration of the Spur Line;
- (d) threatening or intimidating the Plaintiff's employees, servants, agents or other persons having business with the Plaintiff;
- (e) physically interfering with or counselling others to physically interfere with the performance by the Plaintiff of its contractual relations with its employees, servants, agents or other persons having business with the Plaintiff;
- (f) physically obstructing or otherwise impeding, or counselling others to physically obstruct or impede, the movement or operation of the Plaintiff's trains on the Spur Line or anything connected with its railway operations; and
- (g) creating a nuisance by physically obstructing the Plaintiff from carrying on its railway operations.

2. **THIS COURT ORDERS** that the Defendants and each of them, and any and all persons having knowledge of this Order, forthwith remove any and all obstructions placed or created or imposed by them to the Plaintiff's full use of its lands, premises, facilities and equipment on the Main Line.

3. **THIS COURT ORDERS** that any police service or peace officer be and hereby is authorized to arrest, or arrest and remove, any person who has knowledge of this Order and who the police

service or peace officer has reasonable and probable grounds to believe is contravening or has contravened the provisions of this Order.

4. **THIS COURT ORDERS** that any police service or peace officer who arrests or arrests and removes any person pursuant to this Order be authorized to:

- (a) release that person from arrest upon that person agreeing in writing to abide by this Order and to appear before this Court at such time and place as may be fixed for the purpose of being proceeded against for contempt of Court or fixing a date for such proceeding;
- (b) where such person has refused to give a written undertaking to abide by this Order or to appear before this Court, or where in the circumstances the peace officer considers it appropriate, to bring forthwith such person before this Court in Toronto, Ontario, or such other place as the Court may direct, for the purpose of being proceeded against for contempt of Court or for fixing a date for such proceeding; or
- (c) detain such person in custody until such time as it is possible to bring that person before this Court.

5. **THIS COURT ORDERS** that the terms of this Order shall remain in force until varied or discharged by a further Order of the Court.

6. **THIS COURT ORDERS** that the parties shall appear before Justice MacLeod at the Ottawa Court House, 161 Elgin Street, Ottawa, Ontario at 2:00 pm. on January 28, 2013 for the hearing of a motion to continue this Order. CJH

7. **THIS COURT ORDERS** that the Defendants and anyone with notice of this Order may apply to the Court at any time to vary or discharge this Order or so much of it as affects such person, but anyone wishing to do so shall provide the Plaintiff's solicitors with at least twenty-four (24) hours notice thereof, and no such motion shall in any way excuse that person from compliance with the terms of this Order.

A handwritten signature in cursive script, appearing to read "Hackland R.S.J.", is written above a horizontal line.

HACKLAND R.S.J.

CANADIAN NATIONAL RAILWAY COMPANY

- and -

JOHN DOE, et al.

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDINGS COMMENCED AT TORONTO

O R D E R

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Solicitors for the Plaintiff,
Canadian National Railway Company

2021

MAY 14 2021

HALIFAX, N.S.

Hfx. No.

506040

Supreme Court of Nova Scotia

Between:

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia, the Department of Health and Wellness, and the Chief Medical Officer of Health

Applicant

and

Freedom Nova Scotia, John Doe(s), Jane Doe (s), Amy Brown, Tasha Everett, and Dena Churchill

Respondents

INJUNCTION ORDER

BEFORE THE HONOURABLE JUSTICE SCOTT NORTON IN CHAMBERS:

WHEREAS a Notice of Application in Chambers (*ex parte*) for a *quia timet* injunction was filed by the Attorney General of Nova Scotia on May 12, 2021, pursuant to the *Health Protection Act* 2004, c. 4, s. 1;

AND WHEREAS a hearing was held in respect of that application on May 14, 2021, with Duane Eddy representing the Attorney General of Nova Scotia;

AND UPON reviewing the materials filed herein;

AND UPON reviewing the affidavit of Dr. Robert Strang, Chief Medical Officer of Health, and the affidavit of Hayley Crichton;

AND UPON hearing submissions of counsel for the Attorney General of Nova Scotia;

IT IS ORDERED THAT:

1. The application is granted without costs to any party.
2. For the purpose of this Order an "Illegal Public Gathering" has the same meaning and definition as set out in the Public Health Order titled "Restated Order #2 of the Chief Medical Officer of Health Under Section 32 of the *Health Protection Act*, 2004, c.4, s.1" dated May 13, 2021, issued by Dr. Robert Strang.
3. The Respondent and any other person acting under their instruction or in concert with the Respondent or independently to like effect and with Notice of this Order, shall be restrained anywhere in the Province of Nova Scotia from :

a. organizing an in person gathering, including requesting, inciting, or inviting others to attend an "Illegal Public Gathering";

b. promoting an Illegal Public Gathering via social media or otherwise;

c. attending an Illegal Public Gathering of any nature whether indoors or outdoors as set out in the Public Health Orders, as amended, and issued by Dr. Robert Strang, Chief Medical Officer of Health, under section 32 of the *Health Protection Act*.

4. Any member of any Police Service, as defined in the *Police Act* 2004, c. 31, s. 1, or any peace officer as defined in the *Criminal Code*, RSC 1985, c C-46 (collectively, "Law Enforcement"), is authorized to use reasonable force in arresting and removing any person who has notice of this Order and whom Law Enforcement has reasonable and probable grounds to believe is contravening this Order. Upon arresting any person pursuant to this Order, Law Enforcement may detain such person until they may be dealt with in accordance with this Order.

5. Any member of Law Enforcement who arrests, detains, or removes any person pursuant to this Order (hereinafter, the "Offending Party"), is authorized to:

a. bring the Offending Party, as soon as possible, before a Justice of the Supreme Court of Nova Scotia, and the Offending Party will be required to show any reason why there should be no finding of Civil Contempt at a hearing before a Justice of the Supreme Court of Nova Scotia;

b. issue a summons that requires the Offending Party to appear before a Justice of the Supreme Court of Nova Scotia, as soon as possible, and the Offending Party will be required to show any reason why there should be no finding of Civil Contempt at a hearing before a Justice of the Supreme Court of Nova Scotia; or

c. release the Offending Party from arrest upon that person agreeing in writing to undertake to both:

i. appear in person before a Justice of the Supreme Court of Nova Scotia at such time and place as may be fixed for the purpose of being proceeded against for contempt of court, or for fixing a date for such a proceeding; and

ii. obey the Public Health Order issued by the Chief Medical Officer of Health, dated May 13, 2021, as amended.

d. detain such person in custody until such time as it is possible to bring that person before this Court.

6. Service of the Order shall be made upon the individual named Respondents via posting copies of the Order to their respective email addresses and on-line social media accounts. In addition, a copy of this Order shall be posted as is possible on all social media platforms associated with the Respondent Freedom Nova Scotia and Worldwide Rally for Freedom and Democracy. A person shall be deemed to have Notice of this Order upon the Order being published on the Government of Nova Scotia's COVID-19 internet website: <https://novascotia.ca/coronavirus/>, the Order is published in a public forum by the Government of Nova Scotia, or if it is read to them.

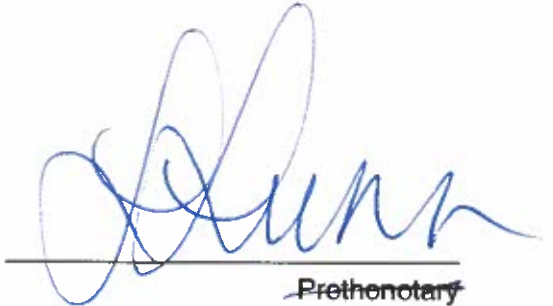
7. The provisions of this Order are additional to and do not limit, exclude, or derogate from:

- a. any powers of Law Enforcement, including but not limited to their powers under the *Criminal Code* and/or applicable provincial legislation; and
- b. any powers under the *Health Protection Act* and Public Health Orders issued under the *Health Protection Act*.

8. This Order shall remain in force until varied or discharged by a further Order of the Court.

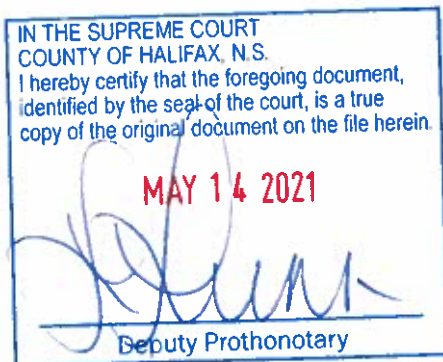
9. The Respondents and anyone with notice of this Order may apply to the Court at any time to vary or discharge this Order or so much of it as affects such person, in accordance with the process provided in the *Civil Procedure Rules* but no such motion shall in any way excuse that person from compliance with the terms of this Order.

Issued at Halifax, Nova Scotia on May 14, 2021.



~~Prothonotary~~

LORRAINE LUNN
Deputy Prothonotary



LORRAINE LUNN
Deputy Prothonotary

ZEXI LI

- and -

CHRIS BARBER, BENJAMIN
DICTER, TAMARA LICH, PATRICK KING and
JOHN DOES 1-60

Plaintiff (Moving Party)

Defendants (Responding Parties)

ONTARIO
SUPERIOR COURT OF JUSTICE

SUPPLEMENTARY MOTION RECORD

CHAMP & ASSOCIATES

[REDACTED]
[REDACTED]
Ottawa, ON K2P 0W6
[REDACTED]

Per: Paul Champ
LSUC#: [REDACTED]

Solicitors for the Plaintiff